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No.

In the

Supreme Court of the United States

JAMES W. WOOD,

Petitioner,

versus

PRUDENTIAL INSURANCE COMPANY OF AMERICA; JAMES W. WOOD; KAREN WOOD, individually and as Guardians of MATTHEW WOOD, incompetent v. PRUDENTIAL INSURANCE COMPANY OF AMERICA; James Wood; Karen Wood, individually and as guardians of Matthew Wood, incompetent

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A straightforward age discrimination action having been instituted by the Petitioner in state court, seeking only recovery of money damages, upon its subsequent removal by the defendant to the U.S. District Court for the District of New Jersey, the District Court and a divided Third Circuit Court of Appeals ruled that Petitioner's state law age discrimination claim was "completely preempted" by ERISA §'s 510 and 502(a) – even though it is undisputed that Petitioner *did not* seek either recovery or enforcement of pension benefits under any covered ERISA plan, the *only* relief available in a civil action under ERISA § 502 (a).

A careful reading of the Third Circuit Court of Appeals' decision in the instant case finds an expansion of the "complete preemption" doctrine in a manner never envisioned by this Court, or by Congress, because it effectively holds that the mere presence of a preemption defense under ERISA § 510 provides a basis for federal jurisdiction pursuant to the "complete preemption" doctrine, and effectively supersedes a state law age discrimination claim whenever the alleged motive for it is to prevent an employee from obtaining pension or retirement benefits. If allowed to stand, this ruling will undoubtedly result in the crippling of the important public policies behind the state anti-discrimination laws, in a variety of employment situations. As such, the Third Circuit's ruling raises the following, important questions for this Court's review:

1) Is "complete preemption" of a state claim that is subject to § 510 of ERISA warranted, even if the state claim does not seek recovery or enforcement of pension benefits?

2) Can an employer avoid liability for age discrimination under a state anti-discrimination statute, simply because the alleged motive for the discrimination is to prevent an employee who is about to reach retirement age from obtaining certain retirement benefits?

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The decision of the United States Court of Appeals for the Third Circuit dated March 28, 2000 in *Wood v. Prudential Ins. Co. of Am.*, is reported at 207 F.3d 674 (3d Cir. N.J. 2000) and set forth in the Appendix at, p. 1a. The opinion of the United States District Court for the District of New Jersey dated July 31, 1998 is unreported and set forth in the Appendix, p. 26

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Third Circuit issued its Decision in this case on March 28, 2000. Panel rehearing and rehearing en banc were timely requested. Rehearing was denied on May 2, 2000. This Petition was timely filed within 90 days of the panel rehearing denial, and is thus timely.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

See appendix

STATEMENT OF THE CASE

In 1998, Petitioner James Wood ("Petitioner") filed suit in a New Jersey state court against his former employer, The Prudential Insurance Company of America ("Prudential"). In his complaint, Petitioner pleaded four counts against Prudential: discrimination based on a New Jersey statute; defamation; outrage; and discrimination based

on the New Jersey constitution. Petitioner alleged that Prudential discriminated against him by terminating his employment to avoid paying benefits to him and his dependents. In his state suit, Petitioner sought, *inter alia*, compensatory damages, damages for humiliation, pain and suffering, and punitive damages. It is undisputed that his state suit *did not* seek recovery or enforcement of his rights to receive any pension benefits.

Prudential removed the suit to the U.S. District Court of New Jersey, asserting that § 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), which prohibits "discharge of a participant or beneficiary for the purpose of interfering with the attainment of any right to which such participant may become entitled" (§ 510, 29 U.S.C. § 1140), completely preempted both Petitioner's claim of discrimination under the state statute and his claim of discrimination under the state constitution. Petitioner filed a timely motion for remand to the Superior Court of New Jersey. In denying his motion, the United States District Court agreed that ERISA completely preempted Petitioner's discrimination claims, and took supplemental jurisdiction over his related state common law claims of defamation and outrage.

Petitioner appealed to the Third Circuit Court of Appeals from the District Court's denial of his Motion to remand his state court suit to the Superior Court of New Jersey. A divided Third Circuit panel affirmed the District Court's denial of the remand motion, and the exercise of federal jurisdiction on the basis of the "complete preemption" doctrine, pursuant to ERISA §510. Petitioner made a timely application to the Third Circuit Court of Appeals for Rehearing and Rehearing In Banc, following the unfavorable decision by the divided Third Circuit panel. Although that application was denied, the Chief Judge of the Third Circuit Court of Appeals, together with four other justices, voted to

grant rehearing.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that this Court should grant Certiorari to resolve a conflict among the Circuit Courts of Appeal on the important jurisdictional issue presented here, and to protect the important rights under state law anti-discrimination statutes which are being systematically destroyed by the unlawful expansion of the "complete preemption" doctrine under ERISA § 510, pursuant to decisions like that of the Third Circuit Court of Appeals in the instant case.

I. THE PANEL OPINION CONFLICTS WITH THE PRECEDENTS OF THE FIFTH AND SIXTH CIRCUITS, WHICH RECOGNIZE THE DANGER OF PERMITTING ERISA TO SUPERSEDE STATE LAW DISCRIMINATION CLAIMS.

The "complete preemption" doctrine exists as a corollary to the "well-pleaded complaint rule," which provides that Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character, and therefore removable to federal court even if, as a result of "artful pleading," no federal issue appears on the face of the complaint itself. *See, e.g., Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55(1987), 481 U.S. at 63-64. The Third Circuit's divided opinion in this case, concluding that the Petitioner's claims were "completely preempted" by ERISA § 510, is not only reflective of the conflict among the Circuit Courts of Appeal, with respect to application of the "complete preemption"

doctrine under ERISA § 510, but it is also a clear signpost of its ripeness for resolution by this Court.

The Third Circuit relied upon this Court's rulings in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), two cases involving analogous state law discrimination claims, for its conclusion that Petitioner's state law age discrimination claim in this case was "completely preempted" by ERISA § 510. However, unlike the Petitioner, who sought only money damages in his state court action, the plaintiff in the *Metropolitan Life* case sought "reimplementation" of his pension benefits. *Id.*, 481 U.S. at 58. By the same token, *Ingersoll-Rand* was a case discussing the defense of "ordinary preemption," which mentioned the jurisdictional doctrine of "complete preemption" only in **dicta**.

Moreover, the Third Circuit's ruling is in direct conflict with decisions by the Fifth and Sixth Circuits, which have recognized the danger of permitting ERISA to supersede state law age discrimination claims. For example, in *Warner v. Ford Motor Co.*, 46 F.3d 531 (6th Cir. 1995), the Sixth Circuit Court of Appeals considered a factual scenario directly analogous to that presented here. *Warner* involved a state court complaint which, like that of plaintiff-appellant James Wood, included a state law claim of age discrimination. The Complaint asserted no federal claims, although it made reference to the loss of retirement benefits. The Sixth Circuit *reversed* the district court's refusal to remand the action to state court, explaining that:

> ...When we look past the complaint before us, the plaintiff's cause of action or basic claim has none of the characteristics of a §1132(a)(1)(B) action to enforce the ERISA agreement...It is an action to set aside and

> escape from the early retirement agreement, **not to recover under it or to "enforce" it or to assert "rights to future benefits under the terms of the plan."... No cause of action created by ERISA may fairly be read to supersede this age discrimination claim, and there is no claim that hostile state courts will somehow subvert enforcement of ERISA in such cases...**
>
> ...[T]he presence of a federal question ... in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule-- that the plaintiff is the master of the complaint...**If a defendant could do so, the plaintiff would be master of nothing**. Congress has long since decided that federal defenses do not provide a basis for removal.

Warner v. Ford Motor Co., 46 F.3d 531, at 534-535 (emphasis supplied).

Similarly, although it did not deal directly with the remand issue, in *Rokohl v. Texaco, Inc.*, 77 F.3d 126 (5th Cir. 1995), the Fifth Circuit Court of Appeals also considered the issue of ERISA preemption in a factual setting almost identical to that presented in the within action. In his removed state court complaint, the *Rokohl* plaintiff alleged that the defendant terminated his employment to prevent him from recovering long-term disability benefits, just as the appellants here contend that plaintiff-appellant James Wood was terminated by Prudential to prevent them from recovering ongoing medical benefits related to the disabilities of plaintiff-appellant Matthew Wood, during Matthew's lifetime. The Fifth Circuit reversed the district court's ruling that this claim was preempted by ERISA, explaining that:

> ...Rokohl's claim fundamentally affects his employee-employer relationship with Texaco, and **only incidentally affects his beneficiary-administrator relationship with the plan.** As such, the connection between Rokohl's claim and Texaco's ERISA-qualified plan is too remote and tenuous to warrant preemption.
>
> Indeed, **if we were to accept Texaco's argument that ERISA preempts Rokohl's TCHRA claim, we would effectively permit Texaco to hide behind its ERISA plan in avoidance of state anti-discrimination laws. To do that would be to allow an employer to disguise its firing decisions--even decisions to dismiss an employee because of his or her race, gender, age, or disability--as benefits decisions, in avoidance of state anti-discrimination statutes.**

Rokohl v. Texaco, Inc., 77 F.3d 126, at 130 (emphasis supplied).

By contrast, two other circuit courts of appeal have applied this Court's rulings in the *Metropolitan Life* and *Ingersoll-Rand* cases and reached the same conclusions as that reached by the Third Circuit in the instant case. As noted by the majority, their ruling in the case at bar is arguably supported by the decision of the Eleventh Circuit Court of Appeals in *Engelhardt v. Paul Revere Life Ins.*, 139 F.3d 1346 (11th Cir.1998), and by the Seventh Circuit Court of Appeals in *Rice v. Panchal*, 65 F.3d 637 (7th Cir.1995).[1]

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[1] But see the ruling by the Seventh Circuit Court of Appeals in *Bucyrus-*

See, e.g., Engelhardt v. Paul Revere Life Ins., 139 F.3d 1346, 1354, n. 11. (11th Cir.1998) ("Although an ERISA beneficiary cannot obtain punitive damages in an action for benefits, the prayer for punitive damages does not take [plaintiff's] claim out of the scope of [Section 502(a)]. If it did, any plaintiff could thwart Congress's intent to completely preempt claims arising out of the denial of ERISA benefits by artful pleading."); *Rice v. Panchal*, 65 F.3d 637, 640 (7th Cir.1995) ("[I]f a claim is within § 502(a) then a participant's ability to recover damages is limited.")

The conflict among the Circuit Courts of Appeal is also reflected in the decisions of several District Courts which have considered this same issue, against the backdrop of this Court's rulings in *Metropolitan Life* and *Ingersoll-Rand*. *See, e.g., Donald v. Virginia Electric Power Company*, 7 F. Supp. 2d 694 (E.D.N.C. 1988); *Smith v. Cohen Benefit Group, Inc.*, 851 F.Supp. 210 (M.D.N.C. 1993); *Miller v. Exxon Corporation*, 1998 WL 7871592 (E.D. La. 1998); *cf.*, *Kalo v. Moen Incorporated*, 93 F. Supp. 2d 869, 873-875 (N.D. Ohio, April 28, 2000)

The cases cited above make it clear that it is uncertainty in the application and interpretation of this Court's existing precedents on the issue of "complete preemption" under ERISA § 510 which is largely responsible for the conflicting opinions of the Circuit Courts of Appeal, and their corresponding District Courts.[2]

Erie Company v. Dept. of Industry, Labor and Human Relations of Wisconsin, 599 F.2d 205 (7th Cir. 1979), where the Seventh Circuit concluded that Congress did not intent to preempt state fair employment laws by the enactment of ERISA.

[2] As noted above, in the divided opinion of the Third Circuit Court of Appeals in this case, the majority relies upon this Court's rulings in *Metropolitan Life Ins. Cc. v. Taylor*, 481 U.S. 58, *and Ingersoll-Rand v. McLendon*, 498 U.S. 133, in finding that Petitioner's state court

This Court should grant Certiorari to further amplify its prior precedents regarding this important jurisdictional issue.

II. THE PANEL OPINION EFFECTIVELY *EXPANDS* THE SCOPE OF THE ERISA "COMPLETE PREEMPTION" DOCTRINE, BY IGNORING THIS COURT'S RULING THAT IT CAN ONLY BE APPLIED IN A "SUIT BY A BENEFICIARY TO RECOVER BENEFITS FROM A COVERED PLAN."

Although the issues presented in this case arise under the "well-pleaded" complaint rule," rather than "artful pleading," Petitioner's state law complaint plead his allegations in an extremely direct, and straightforward manner, openly asserting throughout his contention that:

> [T]he real reason that ... Prudential terminated [his] employment ... was its knowledge that, because he was fifty-one years old, and had more than twenty years of service with Prudential, plaintiff Jim Wood was about to become eligible for full retirement benefits. Defendant Prudential knew that the vesting of those benefits would require it to continue to be responsible for the medical expenses of the plaintiff and of his dependents, including the plaintiff's son, Matthew Wood.

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discrimination claims were subject to "complete preemption." However, the dissent relies upon these *same cases* in reaching its opposite conclusion that the "complete preemption" doctrine should not have been applied. *See, e.g., Wood v. Prudential Insurance Company of America,* 207 F. 2d 674, at 678-679; *cf.*, 207 F.2d 674, at 683-685.

Wood v. Prudential Ins. Co. of Am., 207 F.3d 674 at 677.[3]

Petitioner respectfully submits that, by openly pleading Prudential's "pension-defeating" motive, his state court complaint brings the important jurisdictional issue presented here sharply into focus, and renders this case an ideal candidate for its resolution.

Moreover, in their concurring decision in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987), where, unlike the case at bar, the state law claims at issue *did* seek the enforcement of pension benefits (481 U.S. at 58), Justices Brennan and Marshall noted that the Court's ruling in that case was "a narrow one." *Id.*, 481 U.S. at 67. Justice Brennan explained that:

> I note that our decision should not be interpreted as adopting a broad rule that any defense premised on congressional intent to pre-empt state law is sufficient to establish removal jurisdiction. The Court holds only that removal jurisdiction exists when, as here, "Congress has clearly manifested an intent to make causes of action ... removable to federal court."

Metropolitan Life, 481 U.S. 58, at 67-68.

Significantly, the Congressional intent cited by the Court as the basis for its ruling in *Metropolitan Life* was gleaned from the Conference Report on ERISA describing the civil enforcement provisions of § 502(a), which this Court

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[3] It should be noted, of course, that Petitioner's assertion of this motive was made without the benefit of discovery, which clearly could uncover one or more additional motives for the age discrimination complained of in his state court action.

quoted as follows:

> **"[W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan** which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R.Conf.Rep. No. 93-1280, p. 327 (1974) (emphasis added).

Metropolitan Life, 481 U.S. 58, at_65-66 (emphasis supplied).

Clearly, this Court's holding that the ERISA "complete preemption" doctrine is applicable *only* with respect to "a suit by a beneficiary to recover benefits from a covered plan," emerges directly from the intent of Congress set forth above, with respect to the removability of suits "to enforce benefit rights under the plan or to recover benefits under the plan..." *Id.*

Significantly, the Third Circuit's ruling in this case effectively *eliminates* the requirement that the ERISA "complete preemption" doctrine be applicable *only* with respect to suits "to enforce benefit rights under the plan or to recover benefits under the plan..." Indeed, both the majority and the dissent recognize that the case at bar is *not* a suit which seeks recovery of benefits from any ERISA plan. *See, e.g., Wood v. Prudential Insurance Company of America*, 207 F. 3d. 674, at 678-679; 684-686. As explained by Judge Stapleton in his dissenting opinion, however, the majority

reads this Court's ruling in *Ingersoll-Rand*, 498 U.S. 133, as suggesting that § 510 *by itself* has complete preemptive effect. *Wood v. Prudential Insurance Company of America*, 207 F. 3d. 674, at 684. But Judge Stapleton also explained why that conclusion was erroneous:

> ...The scope of the jurisdictional subsection on which Metropolitan Life relied for its finding of complete preemption is expressly defined in terms of the relief sought, rather than the nature of the cause of action. See 29 U.S.C. S 1132(f) ("The district courts ... shall have jurisdiction ... to grant the relief provided for in subsection (a) of this section in any action."). Moreover, the House Report cited by Metropolitan Life expressly invokes the doctrine of complete preemption twice: "[w]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan," H.R. Conf. Rep. No. 93-1280, 1974 U.S.C.C.A.N. 5038, 1974 WL 11542, at 166, and "suit[s] to recover benefits denied contrary to the terms of [the] plan," id. at 356-57. No such express reference to complete preemption appears in the discussion of the protection against pension-defeating discharge. See id. at 357. Thus neither the statute nor the legislative history provide any evidence of Congressional intent to expand the scope of ERISA's complete preemptive power beyond those actions that fall within the civil enforcement provisions of S 502(a) to actions under S 510 that seek impermissible relief.

Id., 207 F.3d at 683

In the instant case, it may well be that Wood's

> state causes of action include a claim that falls within the ambit of S 510, in that they assert that Wood's discharge was motivated by a desire to prevent his pension from vesting. I would conclude, however, that any such claim does not fall within S 502(a)(3), which reaches only claims for equitable relief. See 29 U.S.C. 1132(a)(3) (other citations omitted).
>
> ...What we have here, plain and simple, is a tort action seeking compensatory damages for interference with advantageous relations, and Wood is accordingly not seeking an equitable remedy. Case law from our court and the Supreme Court dictates, in my judgment, that we so hold.

Id., 207 F.3d at 685.

In his dissenting opinion, Judge Stapleton also noted that *Ingersoll-Rand* was a case involving the defense of "ordinary preemption," and not a "complete preemption" case. Judge Stapleton explained that, as a result, to the extent it relied upon this Court's ruling in *Ingersoll-Rand*, 498 U.S. 133, the majority opinion was erroneously applying a ruling made by this Court in the "ordinary preemption" context, to the completely different situation presented by the jurisdictional issue of "complete preemption":

> The Supreme Court's **dicta in** *Ingersoll-Rand* does not require a different result. Although *Ingersoll-Rand* was a case of ordinary preemption...after determining that S 502(a) provides the exclusive remedy for violations of S 510 the Court stated that "'when it is clear or may fairly be assumed that the activities which a State purports to regulate

> are protected' by S 510 of ERISA, 'due regard for the federal enactment requires that state jurisdiction must yield.'" *Id.* (quoting *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 409 n. 8, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988) (a case of ordinary, rather than complete preemption)). Although the majority reads this statement as suggesting that S 510 itself has complete preemptive effect, to be consistent with *Metropolitan Life* this statement must be read in context, which is that *Ingersoll-Rand* was a case of ordinary preemption in which federal jurisdiction was not at issue. **This context suggests that it is not state court jurisdiction that must yield when regulated activities fall within S 510, but rather the State's jurisdiction to regulate such activities, that is, mere ordinary preemption.** Indeed, the **dicta** at issue immediately follows and supports the Court's holding that "the requirements of conflict pre-emption are satisfied in this case." *Id.*

Wood v. Prudential Insurance Co., 207 F.3d 674, at 683-684 (emphasis supplied).

> **In the instant case, it may well be that Wood's state causes of action include a claim that falls within the ambit of S 510, in that they assert that Wood's discharge was motivated by a desire to prevent his pension from vesting. I would conclude, however, that any such claim does not fall within S 502(a)(3), which reaches only claims for equitable relief.**

Id., 207 F.3d at 685 (emphasis supplied).

It is clear that, by *rejecting* the reasoning of the dissent, and proceeding to apply the "complete preemption" doctrine to Petitioner's state court action, despite the fact that it was *not* a suit to recover benefits or to enforce rights under a plan, the effect of the majority's opinion is to dramatically expand the narrow window created by Congress, and recognized by this Court, for application of the "complete preemption" doctrine in the ERISA context. If the majority's ruling is not overturned, it is clear that "complete preemption" will be applied to lawsuits *regardless* of whether they constitute suits "to recover benefits or to enforce rights under a plan," in direct contravention of the intent of Congress, and this Court's own prior rulings on this important jurisdictional issue.

Moreover, when one considers the fact that, relying upon the same prior rulings of this Court, the majority and the dissent were able to reach diametrically opposed conclusions regarding the important jurisdictional issue presented, the need for the Court to clarify the confusion surrounding this issue is apparent.

III. THE PANEL OPINION THREATENS TO SUBSUME ALL VALID CLAIMS OF AGE DISCRIMINATION ARISING FROM A "PENSION-DEFEATING" MOTIVE.

Effectively "reading out" of his state court complaint Petitioner's state law age discrimination claim, solely on the basis of its finding that the Petitioner's age was "relevant only insofar as it affected his eligibility for benefits," the majority opinion has also effectively rejected the entire prospect of dual liability for age discrimination (or discrimination predicated by membership in any other

protected group), *and* under ERISA § 510, arising from the same "pension-defeating" motive.

Nevertheless, this Court itself expressly recognized the prospect for such "dual liability" in its decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701 (1993).

In *Hazen*, although the Court did not directly consider the issue of whether a state court claim of age discrimination was "completely preempted" by ERISA § 510, it considered the directly analogous issue of whether an employer may be subject to "dual liability" under ERISA § 510 and the Age Discrimination In Employment Act ("ADEA"), if the employer discharges an employee in order to prevent his pension benefits from vesting, and *the employee's age is also a factor in the vesting of the pension benefits*. The Court refused to recognize the existence of "dual liability" on the facts presented in *Hazen*, because in that case the pension benefits at issue vested *solely* on the basis of years of services. *Hazen*, 507 U.S. 604, at 613. However, this Court explicitly recognized that, because the factors of age and years of service are "analytically distinct," in a case like this one, where pension vests on the basis of *both* years of service and age, dual liability for age discrimination *and* for violation of ERISA § 510 could potentially be established, even when the two arise from the same wrongful discharge, and/or are coupled with the same "pension-defeating" motive. *Id.*, 507 U.S. at 612. The Court explained this important precept as follows, in the *Hazen* case:

> ... Pension plans typically provide that an employee's accrued benefits will become nonforfeitable, or "vested," once the employee completes a certain number of years of service with the employer... **Yet an employee's age is analytically distinct from his years of service**. An employee who is

younger than 40, and therefore outside the class of older workers as defined by the ADEA, see 29 U.S.C. § 631(a), may have worked for a particular employer his entire career, while an older worker may have been newly hired. **Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based..."**

We do not mean to suggest that an employer lawfully could fire an employee in order to prevent his pension benefits from vesting. Such conduct is actionable under § 510 of ERISA...See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142-143, 111 S.Ct. 478, 484-485, 112 L.Ed.2d 474 (1990)...

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination._ Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, cf. Metz, 828 F.2d, at 1208 (using "proxy" to mean statutory equivalence), but in the sense that the employer may suppose a correlation between the two factors and act accordingly. **Nor do we rule out the possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status.**

Hazen Paper Co. v. Biggins, 507 U.S. 604, at 612-613 (emphasis supplied).

In the case at bar, the prospect of "dual liability" for discrimination motivated both by the employee's age *and* by his pension status, which this Court envisioned in the *Hazen Paper Co.* case, is precisely the situation that is presented. However, the Third Circuit's majority decision effectively *eliminates* the prospect for such dual liability, by holding that Petitioner's state law age discrimination claim is not only "completely preempted," but completely *subsumed* by ERISA § 510. *Wood v. Prudential*, 207 F.3d 674, at 676-678.

Allowing this decision to stand will provide an effective mechanism for employers who engage in discriminatory activities to shield themselves from liability in state court, whenever a complaint alleges a "pension-defeating" motive as the rationale for the employer's actions, even where, as in the case at bar, the "pension-defeating" motive is inextricably intertwined with discrimination on the basis of another factor, which is also "analytically distinct" from pension status. *Cf.*, *Hazen*, 507 U.S. 604, at 612-613.

Thus, if an employer engages in an intentional campaign of discrimination against an entire class or group, on the basis of age, sex, race, religious affiliation, or national origin, as long as the only motive alleged in the state court complaint is the employer's intention to unlawfully deprive the members of the protected group or class of pension benefits, the employer will be effectively *shielded* from liability for any claims of discrimination, on any other basis which may also be alleged in the same complaint. At worst, the employer will be required to reinstate pension benefits wrongfully discontinued to begin with, but the Third Circuit's approach will provide an absolute shield from

liability for money damages, pursuant to state anti-discrimination laws.[4]

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[4] For example, an employer who engaged in a pattern and practice of discharging all female employees, African-American employees, employees over the age of fifty, Jewish employees, or Catholic employees, because of a discriminatory desire to deprive all individuals in their particular group or class from obtaining full pension benefits, would effectively find refuge in ERISA § 510, from any and all valid state law claims for discrimination brought against it, by virtue of the "complete preemption" doctrine, even though it is clear that discrimination on the basis of age, sex, race, or religion is "analytically distinct" from discrimination on the basis of pension vesting.

CONCLUSION

The lack of clarity and uniformity on the subject of "complete preemption" under ERISA § 510, arising from this Court's prior rulings on that same issue, sends conflicting signals to the Federal Appellate Courts. These conflicting signals are mirrored in the Third Circuit's own divided ruling, as well as in the conflicting rulings of its sister Circuit Courts of Appeal. The conflicting decisions described above make it clear that a District Court, or a Circuit Court of Appeals can "pick and choose" suitable language from this Court's own opinions to fashion decisions that will continue to erode the narrow interpretation of the "complete preemption" doctrine. This state of affairs provides a compelling basis for revisitation of the critical issues raised in this Petition by the Court to insure guidance and guarantee a correct and uniform outcome in similar cases.

Considering the proliferation of ERISA cases, on an ever-widening basis, this Court should also grant this Petition to insure that other litigants do not suffer the loss of important rights like those at issue here, under state and federal anti-discrimination laws. By granting this Petition, the Court can reaffirm and clarify the narrow scope of the "complete preemption" doctrine, and the Court can insure that loss of the important rights which hang in the balance, whenever the issue of "complete preemption" of state law discrimination claims by ERISA § 510 arises, is minimized for litigants in pending cases, and for future litigants can be avoided completely.

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(ANY FOOTNOTES TRAIL END OF EACH DECISION)

JAMES W. WOOD

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA; JAMES W. WOOD; KAREN WOOD, individually and as Guardians of MATTHEW WOOD, incompetent v. PRUDENTIAL INSURANCE COMPANY OF AMERICA; James Wood; Karen Wood, individually and as guardians of Matthew Wood, incompetent Appellants

No. 99-5022

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

207 F.3d 674; 2000 U.S. App. LEXIS 5186

November 16, 1999, Argued

March 28, 2000, Filed

COUNSEL:

G. Martin Meyers (argued), Law Offices of G. Martin Meyers, P.C., Denville, New Jersey, Attorney for Appellants.

Don A. Innamorato, Stephanie Wilson, Reed Smith Shaw & McClay LLP, Princeton, New Jersey and David Bennet Ross, Peter A. Walker (argued), Mara-Louise Anzalone, Seyfarth, Shaw, Fairweather & Geraldson, New York, New York, Attorneys for Appellee.

JUDGES:

Before: ALITO AND STAPLETON, Circuit Judges, and FEIKENS, District Judge. Stapleton, J., dissenting.

OPINIONBY:
FEIKENS

OPINION:

OPINION OF THE COURT

FEIKENS, District Judge:

I. Background

In 1998, Appellant James Wood ("Wood") filed suit in a New Jersey state court against his former employer, The Prudential Insurance Company of America ("Prudential"). In his complaint, Wood pleaded four counts against Prudential: discrimination based on a New Jersey statute[1] ; defamation; outrage; and discrimination based on the New Jersey constitution[2] . Wood alleged that Prudential discriminated against him by terminating his employment to avoid paying benefits[3] to him and his dependents. In this state suit, Wood sought, inter alia, compensatory damages, damages for humiliation, pain and suffering, and punitive damages. Prudential removed the suit to the U.S. District Court of New Jersey asserting that the Employee Retirement Insurance Security Act of 1974 ("ERISA"), *29 U.S.C. § 1001* et seq., completely preempted both Wood's claim of discrimination under the state statute and his claim of discrimination under the state constitution. In denying Wood's motion to remand the suit to state court, the United States District Court held that ERISA completely preempted those two claims. The court took supplemental jurisdiction over the claims of defamation and outrage and construed the claim of outrage as a claim of intentional infliction of emotional distress. Wood and his wife, Karen Wood, individually and on behalf of their son, Matthew Wood, then filed suit later in 1998 in the U.S.

District Court of New Jersey alleging that Prudential's termination of Wood's employment violated ERISA and, since Matthew Wood was disabled, that it violated the Americans with Disabilities Act ("ADA"). For his ERISA claim, Wood sought equitable relief and, for his ADA claim, Wood sought compensatory and other damages. The District Court dismissed the ADA claim, consolidated the two cases, and granted Prudential's motion to submit all claims to arbitration.

II. Issues

Several questions are presented to us on appeal:

1) Is complete preemption of a state claim that is subject to Section 510 of ERISA warranted even if the state claim prays for relief arguably not provided for in Section 502(a) of ERISA?

2) Assuming that complete preemption applies, may the District Court compel arbitration of his claims under the facts of this case?

3) In order to rule on these questions, did the District Court, and do we, have jurisdiction?

III. Complete Preemption

A.

The District Court denied Wood's motion to remand holding that ERISA completely preempted Wood's claim of discrimination based on the state statute. The District Court read that claim as an assertion "that depriving him of his retirement benefits was the motivating purpose for, and not merely a consequence of, his termination." We agree with this reading.[4]

In his state complaint, Woods alleges generally that:

> The real reason that . . . Prudential terminated [his] employment . . . was its knowledge that, because he was fifty-one years old, and had more than twenty years of service with Prudential, plaintiff Jim Wood was about to become eligible for full retirement benefits. Defendant Prudential knew that the vesting of those benefits would require it to continue to be responsible for the medical expenses of the plaintiff and of his dependents, including the plaintiff's son, Matthew Wood. State Complaint P4, A-16. He repeats this general allegation in each of his four state law claims.

State Complaint PP 7, 10, 13, 16, A-19-21. Since Wood's son suffers from severe head injuries due to a car accident, Wood alleges that the medical bills for his son run into the "millions of dollars." State Complaint P 5, A-17.

Wood argues that his complaint contains claims of age and disability discrimination entirely separate from this benefits-defeating allegation. But, we find nothing in his complaint other than an allegation that Prudential terminated Wood's employment to avoid paying health and retirement benefits.

Wood argues that his complaint alleges discrimination based on age because it referred directly to his age. The relevant portion of the allegation reads: "Because he was fifty-one years old, and had more than twenty years of service with Prudential, plaintiff Jim Wood was about to become eligible for full retirement benefits." State Complaint P 4, A-16. It seems obvious that Wood's reference to age, like the accompanying reference to his length of service, establishes the allegation that Wood was "about to become eligible for full retirement benefits." His age is relevant only insofar as it affected his eligibility for benefits. We agree with the District Court when it noted: "Aside from nearing early retirement age, there are no facts alleged in the

Complaint to support a claim that Wood's age had any bearing on Prudential's decision to terminate him."

Wood also argues that his state court complaint alleges discrimination based on the disability of Wood's son. His complaint mentions the disability of his son only in the context of Prudential's potential obligation for the high medical expenses of his son. Since Wood's state discrimination claim provides no rationale for Prudential's treatment other than to avoid paying benefits to him and to his dependents, we read the complaint as alleging that Prudential's termination of Wood's employment had a benefits-defeating motive.

B.

A claim of discharge based on a "benefits-defeating" motive comes under Section 510 of ERISA. That section prohibits the "discharge of a participant or beneficiary for the purpose of interfering with the attainment of any right to which such participant may become entitled." § 510, *29 U.S.C. § 1140.* "Congress enacted this section to prevent unscrupulous employers from discharging or harassing their employees in order to prevent them from obtaining their statutory or plan-based rights." *Zipf v. American Telephone and Telegraph Co., 799 F.2d 889, 891 (3rd Cir. 1986);* see, also, *Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990).*

Section 510 of ERISA does not stand alone; by its terms it gains its enforcement vitality from Section 502. Section 510 provides: "The provisions of [section 502] of this title shall be applicable in the enforcement of this section." § 510, *29 U.S.C. § 1140.* Thus, any state claim that falls within Section 510 is necessarily within Section 502.

C.

Federal courts have jurisdiction over claims "arising under the Constitution, law or treaties of the United States."

28 U.S.C. § 1331. Under the well-pleaded complaint rule, a court determines whether a claim "arises under" federal law from a plaintiff's complaint. *Metropolitan Life v. Taylor, 481 U.S. 58, 62, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987)* ("It is long-settled law that a cause of action arises under federal law only when the plaintiff's well pleaded complaint raises issues of federal law."). A plaintiff is, thus, considered the "master of the complaint." *Caterpillar Inc. v. Williams, 482 U.S. 386, 398-99, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987).*

The United States Supreme Court has recognized the doctrine of complete preemption as a corollary or an exception to the "well-pleaded complaint" rule. *Metropolitan Life, 481 U.S. at 63-64.* Under this complete preemption exception, the Court has held that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Id. Since ERISA Section 502(a) completely preempts a state claim, removal of Wood's state claim to federal jurisdiction is proper. See *id. at 66* ("Congress has clearly manifested an intent to make causes of action within the scope of 502(a) removable to federal court."); *Joyce v. RJR Nabisco Holdings Corp., 126 F.3d 166, 172 (3rd Cir. 1997).*

We reject Wood's contention that, because none of the relief he requested in his state claim is available under Section 502, ERISA does not completely preempt his state action. The relief Wood seeks is irrelevant to a determination of complete preemption. Complete preemption, like ordinary preemption, does not depend on the type of relief requested in a complaint. Complete preemption is an exception to the well-pleaded complaint rule. "The pre-emptive effect of § 502(a) [is] so complete that an ERISA pre-emption defense provides a sufficient basis for removal of a cause of action to the federal forum notwithstanding the traditional limitations imposed by the "well-pleaded complaint" rule." *Ingersoll-*

Rand, 498 U.S. at 145 (citing *Metropolitan Life, 481 U.S. at 64-67).*

Additionally, a state law claim may fall within Section 502(a) and thus be completely preempted even if the plaintiff asks for relief that is not available under Section 502(a). In Metropolitan Life, the plaintiff sought, inter alia, compensatory damages for mental anguish caused by a denial of benefits. *481 U.S. at 61.* Even though such relief is not available under § 502(a), the Court held that ERISA completely preempted his claim and, thus, removal was proper. *Id. at 67.* While the Court considered only Section 501(a)(1)(B), the Court's language applies broadly to all of Section 502(a). See *id. at 66* ("Congress has clearly manifested an attempt to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court.")

Similarly, in Ingersoll-Rand, the Court discussed the interaction of Sections 510 and 502(a) in the context of a plaintiff's requested relief. See *498 U.S. at 145.* It wrote:

Not only is § 502(a) the exclusive remedy for vindicating § 510-protected rights, but there is no basis in § 502(a)'s language for limiting ERISA actions only to those which seek "pension benefits." . . . Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

Id. [5]

In explaining complete preemption in Ingersoll-Rand, the Court applied the rationale of ordinary preemption to complete preemption:

"The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal

scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."

Ingersoll-Rand, 498 U.S. at 144 (quoting *Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987)* (internal citations and quotation marks omitted)). Were we to hold that Wood's claim is not preempted because he sought remedies not provided for in Section 502(a), we would undermine Congress' policy choices as reflected in the remedies it set forth in Section 502(a). Given that "Congress viewed [Section 510] as a crucial part of ERISA" *Ingersoll-Rand Co., 498 U.S. at 143,* we are mindful of these policy choices. Cf. *Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 25-26, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)* (finding state cause of action not completely preempted where "State's right to enforce its tax levies is not of central concern to" ERISA).

We note that Wood, while seeking money damages for his allegedly improper termination in his state claim, see State Complaint, A-19, seeks equitable damages for the same termination in his federal ERISA claim. See Federal Complaint, A-103. Allowing such parallel claims to be tried in both state and federal courts would undermine Congress' choice of remedies as reflected in Section 502(a). See, e.g., *Engelhardt v. Paul Revere Life Ins., 139 F.3d 1346, 1354, n.11.* (11th Cir. 1998) ("Although an ERISA beneficiary cannot obtain punitive damages in an action for benefits, the prayer for punitive damages does not take [plaintiff's] claim out of the scope of [Section 502(a)]. If it did, any plaintiff could thwart Congress's intent to completely preempt claims arising out of the denial of ERISA benefits by artful

pleading.") Complete preemption would be an empty doctrine if a plaintiff could plead his way into state court by seeking only money damages. See, e.g., *Rice v. Panchal, 65 F.3d 637, 640 (7th Cir. 1995)* ("If a claim is within § 502(a) then a participant's ability to recover damages is limited.")

For these reasons, we find that ERISA preempted Wood's state claim of discrimination, that we have jurisdiction, and, thus, we affirm the District Court's denial of remand.

IV. Arbitration

Before turning to the issue whether Wood's claims are arbitrable, we must consider our jurisdiction over the arbitration issue. We reject Prudential's contention that we do not have jurisdiction to consider the decision to compel arbitration.

We have held that where a district court's dismissal of an action signifies that the arbitration is "not a part of any ongoing proceeding," the court of appeals has jurisdiction from a final order. *Nationwide Ins. Co. of Columbus, Ohio v. Patterson, 953 F.2d 44, 46 (3rd Cir. 1991).* In Nationwide, we reviewed a district court's decision to dismiss a case on the grounds that the parties were obliged to arbitrate. There, we stated: "Although the result of the district court's order is that the parties will arbitrate their dispute, the district court's dismissal of [the] action plainly signifies that this is not a part of any ongoing proceeding. Therefore, we hold that we have appellate jurisdiction." Id. In Nationwide, we held the matter a reviewable final order in spite of "the practical effect of the district court's order . . . that the parties will now submit their dispute to arbitration." *Id. at 45.*

To distinguish Nationwide, Prudential seeks to make the point that the District Court in this case faced a motion to compel arbitration while the District Court in Nationwide granted a motion to dismiss and made no order to arbitrate. No matter how the motion is drawn, the District Courts'

conclusions were the same: both in Nationwide and in this case, the District Court appropriately dismissed the action upon motion.

We next consider the District Court's decision to compel arbitration. Our review is plenary. See *Hoxworth v. Blinder, Robinson & Co., Inc., 980 F.2d 912, 925 (3rd Cir. 1992).* The U.S. Supreme Court has held that:

As a matter of federal law, any doubts concerning the scope of arbitration should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983) (emphasis added). In order to obtain a finding that arbitration is waived, a party seeking to avoid arbitration must demonstrate prejudice. See *Hoxworth, 980 F.2d at 925* ("prejudice is the touchstone for determining whether the right to arbitrate has been waived.").

Wood argues that Prudential waived its right to arbitrate because, in a joint discovery plan filed June 12, 1988, Prudential "reserve[d] the right to file a motion to compel arbitration on or before August 1, 1998," and, then, did not act on that intention until September 24, 1998, when it filed its motion to compel arbitration.

We hold that Prudential did not waive its right to arbitrate; the delay was short and Prudential did not engage in significant litigation action that could have caused prejudice to Wood. It delayed seeking arbitration only by one-and-a-half months. Cf. *Hoxworth, 980 F.2d at 926* (finding waiver where delay was eleven months). Prudential's litigation tactics had not been extensive: it had not taken any depositions nor served any discovery demands. Prudential

does not appear to have been "able to use the Federal Rules to conduct discovery not available in the arbitration forum." *Hoxworth, 980 F.2d at 926.* While Prudential contested the merits of the claims in District Court, this is not enough to overcome the presumption of arbitrability. See *Moses H. Cohn, 460 U.S. at 24-25.*

To establish prejudice, Wood argues that Prudential's delay put him at a strategic disadvantage. He states that his "counsel made key litigation decisions based upon his belief that Prudential had abandoned its initial intention to seek arbitration of this controversy," specifically that "counsel would have asked the District Court to withhold any ruling on the defendant's motion to dismiss. . .." The District Court considered that motion and dismissed the Americans with Disability Act claim but not the ERISA claim. Putting aside whether the District Court would have agreed to a request to withhold such a ruling, we do not understand how Wood could be prejudiced by the Court's having decided the matter. For this decision to be prejudicial, we would have to presume that an arbitrator would have decided the merits of the claim differently -- a presumption we cannot make.

Wood argues that the arbitration agreement does not apply to his claims of defamation and of intentional infliction of emotional distress because they both arose after the termination of his employment. The arbitration agreement applicable to this case is contained in a National Association of Securities Dealers ("NASD") Uniform Application for Securities Industry Registration ("U-4 Form") and calls for arbitration of any dispute, claim or controversy between Wood and Prudential "to be arbitrated under the rules . . . or by-laws of [the NASD]." A-246. It requires arbitration under the NASD Code of any claim "arising out of the employment or termination of employment of such associated person(s) with such member. . . ." A-254, NASD Manual (CCH) § 10201.

Wood's claim of defamation is based on Prudential's forwarding of Wood's termination letter to the New Jersey Department of Insurance. State Complaint PP 6, 11, A-17, 19. In that letter, Prudential referenced Wood's alleged violations of company rules. A-23. Since the alleged defamation was a description of Wood's activities while employed at Prudential and was contained in Wood's termination letter, we hold that the claim of defamation arose out of his employment and its termination. Thus, Wood's defamation claim is arbitrable.

Wood's claim of intentional infliction of emotional distress also arises out of Wood's employment and its termination. He alleges that Prudential's actions "were outrageous, by reason of [its] use of false and defamatory allegations of wrongdoing as a pretext for the termination of the plaintiff. . . ." State Complaint P 14, A-20. Again, the claim centers on Wood's termination and is, thus, covered by the arbitration agreement.

Wood also contends that the arbitration agreement does not apply to his state law discrimination claim because of an amendment to the NASD rules. We disagree. The amendment, effective January 1, 1999, exempts from mandatory arbitration "claim[s] alleging employment discrimination . . . in violation of a statute." Rule 10201(b) of NASD Code of Arbitration Procedure, A-525. Because the amendment was not effective until January 1, 1999, it did not affect the arbitration agreement between these two parties which requires Wood to comply with arbitration as defined by the NASD Code at the time he filed suit in 1998. See *Seus v. John Nuveen & Co., Inc., 146 F.3d 175, 187 (3rd Cir. 1998)* ("[The] Form U-4 compliance clause obligates a registrant to comply with the NASD arbitration code as it existed at the time she filed suit.").

We hold, thus, that the arbitration agreement applies to Wood's state law claims of discrimination, defamation, and

intentional infliction of emotional distress. Wood does not dispute that the arbitration agreement applies to his other claims. Thus, we affirm the District Court's ruling to compel arbitration over all the claims in these consolidated cases.

V. Conclusion

We affirm the District Court's decision to deny remand of Wood's state suit. We also affirm the District Court's decision to compel arbitration as to all claims in the consolidated suits.

----------Footnotes----------

n1 New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

n2 New Jersey Constitution of 1947, Art. 1, P 1.

n3 The parties define these benefits as health and retirement benefits.

n4 The District Court held that ERISA also completely preempted Wood's claim of discrimination based on the state constitution because that claim was substantially identical to the claim of discrimination based on the state statute. Both holdings are subject to appeal, but Wood has not challenged the District Court's holding as to the complete preemption of the claim of discrimination based on the state constitution. Thus, we do not address this holding.

n5 While this quoted portion of the opinion in Ingersoll-Rand may be dicta, it is still sound analysis. The dissent argues that we should not give *Ingersoll-Rand, 498 U.S. 133, 112 L. Ed. 2d 474, 111 S. Ct. 478,* any weight because the statements on which we rely are dicta. According to the dissent, when the Court stated, "when it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 510 of ERISA, due regard for the federal enactment requires the state jurisdiction to yield," *id.*

at 145 (emphasis added), this is not a significant statement. We disagree. The Court, even though it did not have to make that statement in the Ingersoll-Rand case, did so, it seems, because it wanted to point out that § 510 does not stand alone and that § 502(a) and § 510 must be read together. It is because of this interaction -- an interaction found in the plain words of § 510, see *29 U.S.C. § 1140* -- that we find that Wood's claim is completely preempted. The dissent is reluctant to recognize that interaction.

DISSENTBY:
Stapleton

DISSENT:

Stapleton, J., dissenting:

Because I conclude that the District Court lacked jurisdiction, I respectfully dissent.

I.

Generally, "the 'well-pleaded complaint rule' requires that, for removal to be appropriate, a federal question must appear on the face of the complaint." *Joyce v. RJR Nabisco Holdings Corp., 126 F.3d 166, 171 (3d Cir. 1997).* "Under a narrow exception to the well-pleaded complaint rule, however, Congress may 'completely preempt' a particular area of law such that any claim that falls within this area is 'necessarily federal in character.' " Id. "Complete preemption" must be distinguished from "ordinary preemption." Complete preemption is a jurisdictional doctrine, whereas ordinary preemption is merely a federal defense that does not create removal jurisdiction. See id.

Absent diversity or some other independent basis for federal jurisdiction, a federal court has no jurisdiction to entertain a complaint removed from a state court that relies

on state law ordinarily preempted by *ERISA. Cf. Caterpillar Inc. v. Williams, 482 U.S. 386, 398, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987)* ("The fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted under the NLRA does not establish that they are removable to federal court."); *Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 316 (3d Cir. 1994)* (" 'State courts are competent to determine whether state law has been preempted by federal law,' and, absent complete preemption, 'they must be permitted to perform that function' with regard to state law claims brought before them."). As a result, such a complaint, if removed, must be returned to state court. The defendant's remedy is to seek dismissal or summary judgment in the state court on the grounds of preemption.

If a claim based on state law is completely preempted, however, it is treated as a federal claim; a district court has federal question removal jurisdiction to entertain it, and the claim, after removal, should go forward in the district court as a federal claim. See *International Brotherhood of Elec. Workers, 481 U.S. 851, 862-63, 95 L. Ed. 2d 791, 107 S. Ct. 2161 (1987)* (after finding complete preemption, considering the merits of plaintiff's suit "treated as a § 301 claim"); *Antol v. Esposto, 100 F.3d 1111, 1114-15 (3d Cir. 1997)* (after determining that it had complete preemption removal jurisdiction, district court adjudicated claim on the merits); see also *Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 56, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987)* (complete preemption results from Congress' intent that suits "be treated as federal questions governed by § 502(a)"); Charles Alan Wright et al., Federal Practice and Procedure § 3722.1, at 511 (3d ed. 1998) (explaining that complete preemption substitutes a federal cause of action for the preempted state cause of action).

Section 514(a) of ERISA broadly preempts "any and all State laws insofar as they relate to any employee benefit plan," but this is ordinary preemption only, and does not

create federal removal jurisdiction. *Joyce, 126 F.3d at 171* (quoting *29 U.S.C. § 1144*(a)). "Only state claims that come within ERISA's civil enforcement provisions in § 502(a) are completely preempted such that removal to federal court is appropriate." Id. State causes of action for wrongful discharge motivated by the desire to prevent a pension from vesting fall squarely within the ambit of § 510 and are ordinarily preempted by ERISA. See *Ingersoll-Rand, 498 U.S. at 140, 142-45.* Ordinary preemption under ERISA, without more, however, does not convert a state claim into one that is necessarily federal for jurisdictional purposes. See *Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987).*

In Metropolitan Life, the Court did find that the civil enforcement provision in § 502(a)(1)(B) has complete preemptive power, but in doing so, it stated that:

even with a provision such as § 502(a)(1)(B) that lies at the heart of a statute with the unique preemptive force of ERISA, however, we would be reluctant to find that extraordinary preemptive power, such as has been found with respect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

Id. at 65. The Court based its finding of complete preemption on strong evidence of Congressional intent, not merely to preempt state law, but to invoke the jurisdictional doctrine of complete preemption. In particular, the Court relied on the fact that "the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA," which the Court had already interpreted as giving rise to complete preemption at the time that ERISA was drafted. Id. (citing *29 U.S.C. § 1132*(f) and *29 U.S.C. § 185*(a)). The Court also noted legislative history stating that:

with respect to suits to enforce benefit rights under the plan or to recover benefits under the plan . .. they may be brought not only in U.S. district courts but also in state courts of competent jurisdiction. All such actions . . . are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.

Id. at 65-66 (quoting H.R. Conf. Rep. No. 93-1280, p. 327 (1974)). The Court concluded that "no more specific reference to the Avco rule can be expected and the rest of the legislative history consistently sets out this clear intention to make § 502(a)(1)(B) suits . . . federal questions for the purposes of federal court jurisdiction in like manner as § 301 of the LMRA." *Id. at 66.*

A similar analysis leads to the conclusion that § 510 standing alone does not have the "extraordinary" preemptive power that converts a state law claim into a federal one for jurisdictional purposes, and that therefore claims that seek impermissible relief for a pension-defeating termination and thus fall within § 510 but not § 502(a) are not removable. The scope of the jurisdictional subsection on which Metropolitan Life relied for its finding of complete preemption is expressly defined in terms of the relief sought, rather than the nature of the cause of action. See *29 U.S.C. § 1132*(f) ("The district courts .. . shall have jurisdiction . . . to grant the relief provided for in subsection (a) of this section in any action.). Moreover, the House Report cited by Metropolitan Life expressly invokes the doctrine of complete preemption twice: "with respect to suits to enforce benefit rights under the plan or to recover benefits under the plan," H.R. Conf. Rep. No. 93-1280, 1974 U.S.C.C.A.N. 5038, *1974 WL 11542, at 166,* and "suit[s] to recover benefits denied contrary to the terms of [the] plan," id. at 356-57. No such express reference to complete preemption appears in the

discussion of the protection against pension-defeating discharge. See id. at 357. Thus neither the statute nor the legislative history provide any evidence of Congressional intent to expand the scope of ERISA's complete preemptive power beyond those actions that fall within the civil enforcement provisions of § 502(a) to actions under § 510 that seek impermissible relief.

This Court's precedent also supports the conclusion that claims seeking legal relief for violations of § 510 are only ordinarily preempted, and that federal jurisdiction is thus improper. This Court has recognized two prerequisites for a finding of complete preemption. "Complete preemption applies only if 'the statute relied upon by the defendant as preemptive contains civil enforcement provisions within the scope of which plaintiff's state claim falls," and there must also be a "clear indication of a Congressional intention to permit removal despite the plaintiff's exclusive reliance on state law." *Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 311 (3d Cir. 1994).* Although ERISA provides a civil enforcement provision for violations of § 510, if Wood's claims do not seek equitable relief, they do not fall "within the scope" of that provision. Furthermore, although there is clear evidence of Congressional intent to permit removal of actions within the scope of the civil enforcement provisions, which actions necessarily are potentially viable federal actions, there is no indication of Congressional intent to permit removal of actions that seek impermissible remedies and thus cannot be viable and must be dismissed.

The Supreme Court's dicta in Ingersoll-Rand does not require a different result. Although Ingersoll-Rand was a case of ordinary preemption,[1] after determining that § 502(a) provides the exclusive remedy for violations of § 510 the Court stated that " 'when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected' by § 510 of ERISA, 'due regard for the federal enactment requires that state jurisdiction must yield.'" Id.

(quoting *Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 409 n.8, 100 L. Ed. 2d 410, 108 S. Ct. 1877 (1988)* (a case of ordinary, rather than complete preemption)). Although the majority reads this statement as suggesting that § 510 itself has complete preemptive effect, to be consistent with Metropolitan Life this statement must be read in context, which is that Ingersoll-Rand was a case of ordinary preemption in which federal jurisdiction was not at issue. This context suggests that it is not state court jurisdiction that must yield when regulated activities fall within § 510, but rather the State's jurisdiction to regulate such activities, that is, mere ordinary preemption. Indeed, the dicta at issue immediately follows and supports the Court's holding that "the requirements of conflict pre-emption are satisfied in this case." Id.

Contrary to the majority's assertion, Metropolitan Life does not stand for the proposition that state law claims may fall within § 502(a) and be completely preempted even if the plaintiff asks only for relief that is not available under § 502(a). While it is true that the plaintiff there claimed "compensation for mental anguish caused by breach of . . . contract" he also claimed "reimplementation of all benefits," the paradigm of § 502(a) relief. *Metropolitan Life Ins. Co., 481 U.S. at 61.* Accordingly, as the Court expressly pointed out, "General Motors and Metropolitan removed to federal court alleging federal question jurisdiction over the disability benefit claim by virtue of ERISA and pendent jurisdiction over the remaining claims." Id. Thus, it was the claim for reinstatement of benefits that gave the Court jurisdiction to consider whether the state law claims seeking impermissible remedies were ordinarily preempted by ERISA.

The fact that the plaintiff seeks remedies in his state cause of action that are unavailable under the federal cause of action clearly does not preclude a finding of ordinary preemption; indeed, ordinary preemption of inconsistent state remedies is the very purpose of the ERISA's limited civil

actions provision and its broad ordinary preemption provision. See *Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51-54, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987)* ("The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA- plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA."). Ordinary preemption, however, is for state courts to determine.

II.

Given that § 510 does not by itself have complete preemptive effect, it becomes necessary to determine whether Wood's claims fall within the civil enforcement provisions of § 502(a). Section 502(a) provides that:

A civil action may be brought--

(1) by a participant or beneficiary--

. . .

(B) to recover benefits due to him under the terms of his plan, to enforce rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

. . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . ..

29 U.S.C. § 1132(a).

Section 510 of ERISA prohibits employers from discharging employees for the purpose of preventing a pension from vesting. See *Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 143, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990).* Section 510 provides that:

> It shall be unlawful for any person to discharge . .. a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . . The provisions of section 1132 of this title [§ 502 of ERISA] shall be applicable in the enforcement of this section.

29 U.S.C. § 1140. Claims under § 510 are enforced under § 502(a)(3). See *Zipf v. American Tel. & Tel. Co., 799 F.2d 889, 891 (3d Cir. 1986);* see also *Ingersoll-Rand, 498 U.S. at 143-44* (quoting only § 502(a)(3) and then stating that § 502(a) provides the remedy for violations of § 510). Since this is not a suit to recover benefits or to enforce rights under a plan, the only potential avenue for finding Wood's state law claims are completely preempted is if they are claims under § 502(a)(3) to obtain "appropriate equitable relief to redress [a] violation[ ] of [§ 510]." *29 U.S.C. § 1132*(a)(3).

In the instant case, it may well be that Wood's state causes of action include a claim that falls within the ambit of § 510, in that they assert that Wood's discharge was motivated by a desire to prevent his pension from vesting. I would conclude, however, that any such claim does not fall within § 502(a)(3), which reaches only claims for equitable relief. See *29 U.S.C. § 1132*(a)(3); *Mertens v. Hewitt Assocs., 508 U.S. 248, 255-62, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993)* (holding that compensatory damages are unavailable under § 502(a)(3), which provides for equitable relief only); In re Unisys Corp. Retiree Med. Benefit "ERISA" *Litig., 57 F.3d 1255, 1268-69 (3d Cir. 1995); Spinelli v. Gaughan, 12 F.3d 853, 857 (9th Cir. 1993)*

(recognizing that Mertens' holding that damages are not available under § 502(a)(3) applies to § 510 claims).

Wood seeks solely money damages. To the extent that his claim falls within the scope of § 510, the damages claimed are to compensate him for injuries inflicted by tortious behavior -- i.e., interference with a relationship that would ultimately have brought him pension benefits from a third party, the ERISA plan. Wood's claim cannot be characterized as an equitable one for restitution because the money sought is not being wrongfully held by the employer. Nor can the damages sought accurately be characterized as incidental to or intertwined with injunctive relief (and thus equitable in nature) because no equitable relief is sought. Finally, a monetary award here cannot be viewed as an alternative to the equitable remedy of reinstatement (by analogy to a Title VII front pay award) both because Wood does not allege that reinstatement is unfeasible and, more importantly, because reinstatement would not result in his receiving pension benefits from the employer. What we have here, plain and simple, is a tort action seeking compensatory damages for interference with advantageous relations, and Wood is accordingly not seeking an equitable remedy. Case law from our court and the Supreme Court dictates, in my judgment, that we so hold.

In *Teamsters v. Terry, 494 U.S. 558, 108 L. Ed. 2d 519, 110 S. Ct. 1339 (1990)*, union members sought damages against the union for breach of the duty of fair representation. The union insisted that the plaintiffs were seeking an equitable remedy and that they were not entitled to a jury trial. The Court concluded to the contrary, observing:

Because we conclude that the remedy respondents seek has none of the attributes that must be present before we will find an exception to the general rule and characterize damages as

equitable, we find that the remedy sought by respondents is legal.

First, we have characterized damages as equitable where they are restitutionary, such as in "action[s] for disgorgement of improper profits," *Tull, 481 U.S. 412 at 424, 107 S. Ct. 1831, 95 L. Ed. 2d 365.* See also *Curtis v. Loether, 415 U.S. 189 at 197, 94 S. Ct. 1005, 39 L. Ed. 2d 260; Porter v. Warner Holding Co., 328 U.S. 395, 402, 90 L. Ed. 1332, 66 S. Ct. 1086 (1946).* The backpay sought by respondents is not money wrongfully held by the Union, but wages and benefits they would have received from McLean [, the employer,] had the Union processed the employees' grievances properly. Such relief is not restitutionary.

Second, a monetary award "incidental to or intertwined with injunctive relief" may be equitable. *Tull, 481 U.S. at 424.* See, e.g., *Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-292, 4 L. Ed. 2d 323, 80 S. Ct. 332 (1960)* (District Court had power, incident to its injunctive powers, to award backpay in that case was restitutionary). Because respondents seek only money damages, this characteristic is clearly absent from the case.

Teamsters, 494 U.S. at 570-71.

The Teamsters Court distinguished on a number of grounds the Title VII cases that characterize backpay awards as a form of "equitable relief." First, the Court pointed out that Congress had specifically characterized backpay under Title VII as "equitable relief." *Id. at 572.* Second, and most important for present purposes, the Court noted that "backpay sought from an employer under Title VII would generally be restitutionary in nature . . ., in contrast to the damages sought here from the Union" to compensate for income the plaintiff would have received from the employer had there been no breach of the duty of fair representation. Id.; see also

Wooddell v. International Bd. of Elec. Workers, 502 U.S. 93, 97-98, 116 L. Ed. 2d 419, 112 S. Ct. 494 (1981) (holding in a suit by a union member against his union for discrimination in job referrals in the operation of its hiring hall that a "claim for lost wages cannot be treated as restitutionary . . . as the damages sought are for pay for jobs to which the union failed to refer him").

This Court followed a similar line of reasoning in *Rickel v. Commissioner, 900 F.2d 655, 664 n.16 (3d Cir. 1990)*, where we explained that a restitutionary award representing wages earned but not paid is to be distinguished from an award compensating for the inability to earn an income from another source due to tortious interference.

There is one Third Circuit case that recognizes the availability of front pay in a Title VII case as "an alternative to the traditional remedy of reinstatement" prior to the statutory amendment that made damages available under Title VII. See *Goss v. Exxon Office Systems Co., 747 F.2d 885 (3d Cir. 1984)*. Goss does not help Wood, however. As Goss and the ADEA cases (the ADEA has always authorized legal and equitable remedies) recognize, a front pay remedy is available only where reinstatement is not an available remedy. See, e.g., *Maxfield v. Sinclair Intern., 766 F.2d 788 (3d Cir. 1985)*. Moreover, unlike front pay, recovery on the claim here asserted would not be a substitute for a reinstatement remedy since reinstatement would not call for the defendant to pay Woods' pension benefits.

Based on the foregoing, I conclude that the District Court had no jurisdiction over the claims made in the state complaint and should have remanded those claims to the state court, where Prudential may raise its preemption defense.

JAMES W. WOOD

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA; JAMES W. WOOD; KAREN WOOD, individually and as Guardians of MATTHEW WOOD, incompetent v. PRUDENTIAL INSURANCE COMPANY OF AMERICA; James Wood; Karen Wood, individually and as guardians of Matthew Wood, incompetent Defendants

No. 98-2383

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF NEW JERSEY

Filed 7/31/98

This matter comes before the Court on plaintiff James Wood's motion to remand the above-captioned case to the New Jersey Superior Court. Defendant Prudential Insurance Company has filed a counter-motion to consolidate the above-captioned case with the case *Wood v. Prudential Ins. Co. of America,* Civil No. 98-2487 (AET) currently pending before this Court. For the foregoing reasons, plaintiff's motion to remand will be denied. Defendant's motion to consolidate will be granted.

BACKGROUND

Plaintiff James Wood was employed by defendant Prudential Insurance Company of America ("Prudential") as an insurance agent and insurance sales manager from June 1974 until May of 1997. In 1996, Prudential commenced an

internal investigation, of the plaintiff for alleged violations of company policy after purportedly receiving several customer complaints bout the plaintiff. At the conclusion of its investigation, Prudential determined that Wood had committed several violations of company policy in the sales of specific insurance policies and terminated him accordingly.

On or about March 18, 1998 plaintiff filed the instant action in the Superior Court of New Jersey, Law Division, Hunterdon County (hereinafter referred to as "Wood I"). Wood alleged that "the real reason that defendant Prudential terminated . . . [plaintiff's] employment was its knowledge that, because he was fifty-one years old and had more that twenty years of service with Prudential, plaintiff Jim Woods was about to become eligible for full retirement benefits." Compl 4. Specifically, Wood asserts that Prudential terminated him to avoid the vesting of certain health and medical benefits which would have provided coverage for plaintiff's dependent son Michael. In 1991, Michael sustained severe and permanent injuries in an automobile accident and required intensive medical treatment which was paid for by Prudential. Woods maintains that by terminating him prior to receiving full retirement benefits, Prudential avoided having its obligation to pay for Michael's medical expenses become permanent and thereby avoided the likely millions of dollars in medical expenses which will be incurred over Michael's lifetime. In his Complaint, Wood asserts claims of age discrimination in violation of the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A 10:5-1 et seq., violations of the New Jersey state constitution, and the common law torts of defamation and outrageous misconduct.

On or about May 11, 1998, Prudential removed the instant action pursuant to 28 U.S.C. § 1441(b). On or about May 27, 1998, plaintiff filed the action Wood v. Prudential

Ins. Co. of America, Civil Action No 98-2487 (AET), (hereinafter referred to as 'Wood II") with his wife, individually and on behalf of their son, asserting claims under the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C § 1001 *et seq.* and the American with Disabilities Act ("ADA"), 42 U.S.C, § 12101 *et seq.* Plaintiff now moves to remand the instant action to the Superior Court. The defendant opposes remand and moves for a consolidation of Wood I and Wood II.

DISCUSSION

I. MOTION FOR REMAND

A. Standard of Review

In construing a motion to remand, this Court must assume as true all factual allegations in the Complaint and must resolve any uncertainties as to the state of controlling law in favor of the movant. *See Batoff v. State Farm Ins. Co.,* 977 F.2d 848, 85 1-52 (3rd Cir. 1992). As the removing defendant, Prudential bears the burden of proving the existence of federal jurisdiction. *See id.* Prudential removed the instant action to this Court pursuant to 28 U.S.C. § 1441(b)[1] Prudential argues that federal question jurisdiction under 28 U.S.C. § 1331 is an appropriate grounds for removal because the Complaint "arises under" federal law. Specifically, Prudential asserts that because the Complaint alleges that Prudential's motivation for terminating Wood was to prevent him from receiving full retirement benefits, Wood is actually seeking to enforce rights under § 502(a) of ERISA.

In general, a state court complaint may be removed to

federal court on the basis of federal question jurisdiction only if the federal question appears on the face of a "well-pleaded" complaint. See Franchise Tax Bd. of Calif. v. Construction Laborers Vacation Trust, 463 U.S.1, 9-10 (1983); Dukes v. U.S. Healthcare, 57 F.3d 350,353 (3rd Cir.), cert. denied, — U.S. —, 116 S.Ct. 564 (1995). In the case at bar, no federal question appears upon the face of the complaint as Woods pled his complaint based solely upon New Jersey law. However, a limited exception to the "well-pleaded complaint" rule does exist. Under this exception, "Congress may so completely preempt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64-66 (1987). Complete preemption "occurs when federal law so completely preempts an entire area of law that the state cause of action is entirely displaced by federal law. If this doctrine applies, the district court has removal jurisdiction, even if the well-pleaded complaint rule is not satisfied." Joyce v. RJR Nabisco Holdings Co., 126 F.3d 166, 171 (3rd Cir. 1996) (citing Dukes, 57 F.3d at 355).

The Supreme Court has established that Congress intended the complete preemption doctrine to apply to state law claims which fall within the scope of § 502(a), the civil enforcement provision of ERISA. The pertinent part of that provision permits a "participant or beneficiary" to bring a civil action "to recover benefits due to him under the terms of his plain, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . .". Prudential maintains that the case at bar is removable because the Complaint sets forth claims which fall within the scope of § 502(a). The Court will examine each count of the Complaint below to determine whether the complete preemption doctrine is applicable.[2]

II. ANALYSIS OF PLAINTIFF'S COMPLAINT

A. Age Discrimination Claim

In Count I of the Complaint, Wood asserts that his age was a "determinative factor" in his termination in violation of the NJLAD. Compl., 9. However, in a preceding paragraph, Wood claims that the "real reason" Prudential terminated him was to prevent him from reaching early retirement and becoming eligible for full retirement benefits, including medical benefits for his disabled, dependent son. Wood further claims that "by terminating [his employment] before he reached early retirement age, defendant Prudential was able to reduce any further obligation to fund the medical expenses of his son, Matthew Wood,. . . and to deprive the plaintiff of other retirement benefits he would be entitled to upon reaching retirement age." Compl., ¶ 5.

Plaintiff's claims fall within the scope of § 502(a). Section 510 of ERISA expressly prohibits an employer from terminating or in any fashion interfering with a plan participant's exercise of any right which he is, or may become, entitled to under an employee benefits plan. The Supreme Court has established that ERISA protects plan participants from termination "motivated by a desire to prevent a pension from vesting." Ingersoll-Rand v. McClendon, 498 U.S. 133, 143 (1990). The factual allegations contained in the Complaint indicate that age was

a salient factor only insofar as it related to plaintiff's eligibility for retirement benefits. Aside from nearing early retirement age, there are no facts alleged in the Complaint to support a claim that Wood's age had any bearing on Prudential's decision to terminate him. Wood does not allege that Prudential treated him differently from similarly situated younger individuals or considered his age in making employment decisions such as promotion or compensation. In sum, the only age discrimination alleged by Wood is intertwined with his status as a potential beneficiary of retirement benefits under an ERISA-covered plan. Although phrased as an age discrimination claim, essentially Wood's claim is that Prudential terminated him to prevent him from exercising his rights as a beneficiary, a claim which is expressly covered by § 502(a). See, e.g., Thisleton V. Plastinetics, Civil Action No. 96-4775 (D.N.J.) (finding an NJLAD age discrimination claim to be preempted by ERISA).

Plaintiff relies upon the case Mints v. Educational Testing Service, 99 F.3d 1253 (3rd Cir. 1996) for the proposition that not all state law causes of action are completely preempted by ERISA so as to create removal jurisdiction. In Mints, plaintiff Jeffery Mints filed a state court action alleging that his termination was based upon gender and age discrimination in violation of the NJLAD. He also asserted state law claims of defamation, breach of contract, and wrongful discharge. Mints, 99 F.3d at 1254-55. Defendant Educational Testing Services ("ETS") removed the action to federal court on the grounds that the state law claims were preempted by ERISA. Mints moved for remand and the district court granted the motion. Id. On appeal, the Third Circuit affirmed the remand. Id. at 1260-61.

Mints is distinguishable from the case at bar. In affinning the remand, the Third Circuit noted that Mints

raised the loss of benefits as a "consequence of ETS's actions which allegedly violated state law." *Mints*, 99 F.3d at 1261. In contrast, in the case at bar, Wood asserts that depriving him of his retirement benefits was the motivating *purpose* for, and not merely a consequence of, his termination. As discussed above, claims that a plan participant was terminated to prevent or interfere with the receipt of benefits provided by an ERISA-covered plan fall squarely within the ambit of § 502(a). Accordingly, we conclude that Count I of the complaint, asserting a claim of age discrimination under the NJLAD is completely preempted by ERISA and thereby creates a basis for removal jurisdiction.

B. Outrageous Misconduct Claim

In Count III of the Complaint, Wood maintains that the "actions of defendant Prudential were outrageous, by reason of the defendant's use of false and defamatory allegations of wrongdoing as a pretext for the termination of plaintiff, after almost twenty-five years of employment, and its efforts to deprive plaintiff and his dependents of retiree benefits including, *inter alia*, retiree medical insurance coverage which defendant Prudential knew full well was desperately needed by plaintiff and his dependents." Compl., ¶ 14.

As a threshold issue, it does not appear that a common law tort of outrageous misconduct has been recognized by New Jersey courts. Insofar as Wood seeks compensation for the emotional distress caused by Prudential's alleged attempts to deprive him of his retiree benefits, this court will construe the Complaint as setting forth a claim of intentional infliction of emotional distress.

The complete preemption doctrine is inapplicable to plaintiff' claim for emotional distress. As stated above, only

those state law claims that come within ERISA's civil enforcement provisions in § 502(a) are completely preempted and may form a valid basis for removal jurisdiction. Joyce, 126 F.3d at 171. In the instant case, a claim for emotional distress is not analogous to an action brought to recover benefits, to enforce beneficiary rights, or to clarify beneficiary rights under an ERISA-covered employee benefits plan. Nor is the right to recover damages for emotional distress expressly protected by any other provision of ERISA. See Dukes, 57 F.3d at 361. We find that Count IH, setting forth a claim of outrageous misconduct, does not fall within the scope of the civil enforcement provisions of § 502(a). Therefore, the complete preemption doctrine does not apply to Wood's outrageous misconduct claim and no basis for federal removal jurisdiction exists.

C. Defamation Claim

In Count H of the Complaint, Wood argues that Prudential defamed him when it allegedly falsely accused him of misappropriating premium payments and other violations of company policy and brought these accusations to the attention of outside parties, including the New Jersey Department of Insurance. Specifically, Wood argues that Prudential knew, or recklessly failed to determine, that he had deposited the allegedly misappropriated premium payments in a Prudential bank account. See Compl., ¶11 2,3 and 6.

We find that Wood's defamation claim is not subject to complete preemption by ERISA. As is the case with the outrageous misconduct claim, Wood's defamation claim is not analogous to an action to recover benefits, or to enforce or clarify beneficiary rights under a specific plan. Nor is defamation a cause of action explicitly recognized in any

other provision of ERISA. *See Dukes, 57* F.3d at 361. On its face, Wood's defamation claim does not fall within the scope of ERISA's civil enforcement provisions as embodied in § 502(a). Therefore, the complete preemption doctrine does not apply to Wood's defamation claim and no basis for removal jurisdiction exists.

D. New Jersey Constitutional Claim

In Count IV of the Complaint, Wood asserts that Prudential's conduct violated Article 1, ¶ 1 of the New Jersey Constitution of 1947. Article 1, ¶ 1 provides, in pertinent part,

> "All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

Wood does not state which right or rights protected by Article I was allegedly violated by Prudential. However, the New Jersey Supreme Court has interpreted Article 1, ¶ 1 to implicitly include the concept of equal protection and to provide a private right of action for employment discrimination analogous to claims brought under the NJLAD. *See Peper v. Princeton University Board of Trustees,* 77 N.J. 55, 79-80 (1978). Accordingly, we will interpret Count IV as setting forth a claim of age discrimination under the New Jersey constitution similar to the age discrimination claim in Count I. For the reasons discussed in relation to Count I, we find that the complete preemption doctrine applies to Wood's state constitutional claim.

This court finds that Counts I and IV of the Complaint are subject to complete preemption by ERISA, thereby creating removal jurisdiction as these claims "arise under" federal law within the meaning of 28 U.S.C. § 1331. Therefore, plaintiff's motion to remand the instant action to state court will be denied. Counts II and III are not subject to complete preemption and the court will exercise supplemental jurisdiction over these claims pursuant to

28 U.S.C. § 1367.

III. MOTION FOR CONSOLIDATION

Prudential moves to consolidate the instant action with Wood II, in which plaintiff, along with his wife, assert claims under ERISA and the ADA. Federal Rule of Civil Procedure 42(a) provides that "when actions involving a common question of law or fact are pending before the court," the court may consolidate the actions to "avoid unnecessary cost or delay." Prudential argues that the case at bar should be consolidated with Wood II because both cases arises from the same set of circumstances — Wood's termination — and raise almost identical questions of law and fact. We agree. We find that the interests of justice require the consolidation of the instant action and Wood II to avoid duplicative proceedings. While the plaintiff is entitled to his day in court, he is not entitled to fragment litigation which can and should be addressed in a single judicial forum. Prudential's motion to consolidate will be granted.

The inapplicability of the doctrine of complete preemption to Counts II and III has no bearing on the availability of ordinary preemption to Prudential as a defense to both claims. *See Joyce,* 126 F.3d a 171 ("Even if complete preemption does not apply, the defendant may nonetheless claim federal preemption as a defense.").

CONCLUSION

Plaintiff's motion to remand the instant action to the Superior Court of New Jersey will be denied. Defendant's motion for consolidation will be denied. An appropriate Order is filed herewith.

----------Footnotes----------

1§ 1441(b) provides, in pertinent part, as follows:

"Any civil, action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. .

2 Although not expressly stated by either party, the Court assumes that the retirementplan at issue in this case is an "employee benefits plan" governed by ERISA under 29 U.S.C. §1002(3).

JAMES W. WOOD

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA; JAMES W. WOOD; KAREN WOOD, individually and as Guardians of MATTHEW WOOD, incompetent v. PRUDENTIAL INSURANCE COMPANY OF AMERICA; James Wood; Karen Wood, individually and as guardians of Matthew Wood, incompetent Appellants

No. 99-5022

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

May 2, 2000, Filed

ORDER

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Chief Judge Becker, Judges Greenberg, Scirica and Rendell would have granted rehearing and Judge Stapelton would have granted panel rehearing.

TITLE 29. LABOR

CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

PROTECTION OF EMPLOYEE BENEFIT RIGHTS

REGULATORY PROVISIONS

ADMINISTRATION AND ENFORCEMENT

29 USCS § 1140 (2000)

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [*29 USCS § 1201*], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [*29 USCS § 1132*] shall be applicable in the enforcement of this section.

LEXSTAT 29 USC 1132

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*** THIS SECTION IS CURRENT THROUGH 106-228, APPROVED 6/29/00 ***
*** WITH A GAP OF 106-224 ***

TITLE 29. LABOR

CHAPTER 18. EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

PROTECTION OF EMPLOYEE BENEFIT RIGHTS

REGULATORY PROVISIONS

ADMINISTRATION AND ENFORCEMENT

29 USCS § 1132 (2000)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought--

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the

(2)

No. 00-181

Supreme Court, U.S.
FILED
SEP - 5 2000
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IN THE

Supreme Court of the United States

JAMES W. WOOD,

Petitioner,

—v.—

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a state-court complaint alleges that the "real reason" for terminating the plaintiff's employment was to prevent his vesting lifetime medical benefits under a pension plan covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), does the doctrine of complete preemption permit removal of the complaint as an exception to the well-pleaded complaint rule, regardless of the nature of the damages sought by the complaint?

STATEMENT PURSUANT TO RULE 29.6

The Prudential Insurance Company of America has no parent companies, nor does any publicly held company own an interest of more than ten percent in The Prudential Insurance Company of America.

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STATUTORY PROVISIONS INVOLVED

This matter involves various provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, including the following:

29 U.S.C. § 1132(a) [ERISA § 502(a)] provides in pertinent part:

> (a) Persons empowered to bring a civil action. A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5) or (6) of subsection (c) of this section or under subsection (i) or (1) of this section.

29 U.S.C. § 1140 [ERISA § 510] provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an

employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 *et seq.*], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

29 U.S.C. § 1144(a) [ERISA § 514(a)] provides:

(a) Supersedure; effective date.
Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, The Prudential Insurance Company of America, respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. Respondent submits that the Petition should be denied because the question presented does not reflect conflicting decisions of courts of appeals and was, in fact, decided by the United States Court of Appeals for the Third Circuit based on settled law. Petitioner raises no other issue that is ripe for review.

STATEMENT OF THE CASE

The facts are fully set forth in the Third Circuit opinion affirming the district court's judgment. (Pet. 2a-9a.) Set forth below is a summary of the facts which relate to the issues raised in the Petition for a Writ of Certiorari.

On March 19, 1998, after his termination from employment with Respondent, Petitioner filed a complaint against Respondent in the Superior Court of New Jersey, Law Division, Hunterdon County, asserting claims of age discrimination under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* (the "NJLAD") and the New Jersey State Constitution, in addition to state-law tort claims of defamation and intentional infliction of emotional distress (the "Complaint"). (Appendix to Respondent's Brief

in Opposition (referred to hereinafter as "Resp't App.") 1A-10A.) On May 11, 1998, Respondent removed this action to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1331 and § 1441(b), on the ground that it was completely preempted by § 502 and § 510 of ERISA,[1] and thus not subject to the "well-pleaded complaint" doctrine. Respondent further requested that the court assert supplemental jurisdiction over the remaining state claims pursuant to 28 U.S.C. § 1367.

Respondent maintains an employee benefit plan subject to the provisions of ERISA that provides pension benefits and continued health insurance to retired employees and their dependents. Respondent based its removal on the language of the Complaint which asserted a pension-defeating motive for terminating Petitioner's employment as follows:

> the real reason that [Respondent] terminated the employment of [Petitioner] was its knowledge that, because he was fifty-one years old, and had more than twenty years of service with [Respondent], [Petitioner] was about to

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[1] In keeping with the form of citations contained in the Petition, Respondent will refer to sections of ERISA by their internal statutory citations. Parallel references to the United States Code are provided in Respondent's Table of Authorities.

> become eligible for full retirement benefits. [Respondent] knew that the vesting of those benefits would require it to continue to be responsible for the medical expenses of [Petitioner] and of his dependents, including [Petitioner's] son . . . .

(Resp't App. 3A.)

This case does not raise broad factual, policy or legal questions because avoidance of the obligation to pay medical benefits is the *only* reason asserted in the Complaint for Respondent's termination of Petitioner's employment. As the district court found, and the court of appeals concurred:

> [a]side from nearing early retirement age, there are no facts alleged in the Complaint to support a claim that [Petitioner's] age had any bearing on [Respondent's] decision to terminate him.

(Pet. 30a.)

On May 27, 1998, Petitioner and his wife filed a *second* complaint against Respondent in the same district court asserting, *inter alia*, claims under ERISA § 502(a)(1)(b) and § 510, which contains the exact same allegations as his purported state court Complaint. (*Compare* Resp't App. 14A-15A, ¶¶ 6-7, *and* Resp't App. 3A-4A, ¶¶ 4-5.) Petitioner subsequently moved to remand the removed Complaint.

On July 2, 1998, Respondent moved to consolidate the two actions because the factual allegations of each were virtually identical, and, in particular, the allegations relating to § 510 were identical. Petitioner's sole opposition to the motion to consolidate was that, before reaching the issue of consolidation, the district court should address Petitioner's remand motion.

By Opinion and Order dated July 30, 1998, Chief District Court Judge Thompson denied Petitioner's Motion to Remand, finding that his discrimination claims under the NJLAD and the New Jersey State Constitution were completely preempted by § 510 of ERISA, and additionally ordered the actions consolidated. (Pet. 25a-35a.)[2]

On March 28, 2000, the United States Court of Appeals for the Third Circuit in a published opinion affirmed the judgment of the district court. *Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674 (3d Cir. 2000). (Pet. 1a-24a.) Petitioner's subsequent Petition for Rehearing and Rehearing

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[2] The district court also exercised supplemental jurisdiction over the claims of defamation and intentional infliction of emotional distress, (Pet. 25a-35a) (citation omitted), noting that, "[t]he inapplicability of the doctrine of complete preemption to [these counts] has no bearing on the availability of ordinary preemption to [Respondent] as a defense to both claims." (Pet. 35a.)

En Banc was denied by an *en banc* panel of the court of appeals. (Pet. 36a.)

SUMMARY OF ARGUMENT

Petitioner has asserted three bases for his contention that this Court should review the lower court's decision:

First, Petitioner contends his ERISA § 510 claim is not completely preempted because, only ERISA § 502(a)(1)(B) claims are completely preempted as matter of law. Petitioner further argues that the lower courts are in wide disagreement over this issue.

Second, Petitioner contends that his § 510 claim cannot be preempted under *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58 (1987), because, unlike the plaintiff in that case, Petitioner did not explicitly seek, as damages, the reimplementation of his pension benefits.

Third, Petitioner contends that language in *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993), somehow immunizes his Complaint from complete preemption – and thus, from removal to federal court – even though he pleads only a pension-defeating motive and no facts establishing an independent state age discrimination cause of action, and he does not attempt to plead a claim for age discrimination under federal law.

As set forth below, none of these arguments raises an issue deserving of review by this Court, due to the unique factual circumstances of this case and the settled law on these issues. Notwithstanding Petitioner's assertions, no split in the circuits has arisen on the applicable law, and, to the extent that the circuit courts' opinions may continue to develop in this area, there is no issue ripe for review.

ARGUMENT

A.

THE PETITION SHOULD BE DENIED BECAUSE IT IS SETTLED BY LAW THAT COMPLETE PREEMPTION APPLIES TO § 510 CLAIMS, WHICH ARE ENFORCED UNDER § 502(a).

1. The Circuit Courts Have Uniformly and Properly Read *Metropolitan Life* to Apply Complete Preemption to All § 502(a) Claims.

Contrary to Petitioner's characterization of the lower court's decision, the court of appeals adhered to the comprehensive guidance offered by this Court concerning complete preemption under § 502(a) of ERISA. There is no split in the circuits on this issue. Simply put, every court of appeals to have considered the question has agreed with the determination below that *all* claims arising under ERISA

§ 502(a), including § 510 claims, are completely preempted under this Court's decision in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). *See Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F. 3d 1212, *as amended*, 208 F.3d 1170 (9th Cir. 2000) (finding cause of action falling within § 502(a) completely preempted); *Smith v. Provident Bank*, 170 F.3d 609, 613-14 (6th Cir. 1999) (finding claim under § 502(a)(2) completely preempted); *Romney v. Lin*, 94 F.3d 74, 80-81 (2d Cir. 1996) (finding claim under § 502(a)(3) is completely preempted), *cert. denied*, 522 U.S. 906 (1997); *Anderson v. Electronic Data Servs. Corp.*, 11 F.3d 1311, 1314-15 (5th Cir.) (finding claims under §§ 502(a)(2) and (3), including § 510 claim, completely preempt state cause of action), *cert. denied*, 513 U.S. 808 (1994); *see also Kalo v. Moen Inc.*, 93 F. Supp.2d 869, 872 (N.D. Ohio 2000) ("[n]umerous circuit courts have applied the complete preemption doctrine of *Metropolitan Life* to claims arising under provisions of [§ 502(a)] other than subsection [502(a))(1)(B)")]); *C.C. Mid West, Inc. v. McDougall*, 990 F. Supp. 914, 920 (E.D. Mich. 1998) ("federal courts possess [removal] jurisdiction over all claims originating under [§ 502(a)], and not just [§ 502(a)(1)(B)]"). Petitioner relies solely on Chief Judge Stapleton's dissent, and cites *no* court of appeals decision that holds that ERISA's complete preemption power is limited to subsection (a)(1)(B).[3]

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[3] The uniformity among decisions of lower courts is well justified, as a reading of *Metropolitan Life* (continued...)

Reasoning backward from his desired result, Petitioner insists instead that *Metropolitan Life* sets forth a "requirement that the ERISA 'complete preemption' doctrine be applicable *only* with respect to suits 'to enforce benefit rights under the plan or to recover benefits under the plan.'" (Pet. 10.) This cramped interpretation of *Metropolitan Life*'s reasoning ignores almost all of the decision's language and logic, as well as the import of decisions of this Court handed down on ERISA complete preemption prior and subsequent to *Metropolitan Life*.

Metropolitan Life contains multiple references to § 502(a) generally when dealing with ERISA removal. While analogizing § 502(f) to § 301 of the Labor Management

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[3](...continued)
unequivocally indicates that this Court considered, and applied its holding to, claims falling within the entire scope of ERISA § 502(a). *See generally* Langbein & Wolk, *Pension and Employee Benefits Law,* 689 (Foundation Press, 2d ed. 1989) (*Metropolitan Life* "certainly implies that any claim within the scope of ERISA § 502(a) would fall within the *Avco* [complete preemption] rule").

Relations Act of 1947, 29 U.S.C. §§ 141-88 (the "LMRA"),[4] this Court stated in that decision as follows:

> The Conference Report on ERISA describing the civil enforcement provisions of § 502(a) says:
>
> > [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under*

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[4] LMRA § 301 provides that suits "may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a). Section 502(f) of ERISA reads: The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action. 29 U.S.C. § 1132(f).

> *section 301 of the Labor-Management Relations Act of 1947.*

Metropolitan Life, 481 U.S. at 65-66 (emphasis in original). This Court continued by stating:

> Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court.

Id. at 66.

As these statements demonstrate, this Court considered the removability of ERISA actions in the context of § 502(a) generally, without limiting removability to claims brought only under subsection (a)(1)(B). Since *Metropolitan Life*, this Court has consistently indicated that it considers § 502(a), and not merely subsection (a)(1)(B) thereof, to be the equivalent of the LMRA's exclusive remedy. Most recently, in *UNUM Life Insurance Co. of America v. Ward*, Justice Ginsburg discussed *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), noting this Court's agreement, in that case, with the proposition that § 502(a) was modeled on the exclusive remedy provided by LMRA § 301. *Unum Life Ins. Co.*, 526 U.S. 358, 376 n.7 (1999).

Moreover, ERISA's legislative history demonstrates that preemption removal is necessary for important policy

reasons, such as uniformity and the delicate 'interest balancing' achieved under the statute.[5] Without a predictable and uniformly applied set of remedies for causes of action regarding employee benefit plans, employers, stung by large plaintiff's awards, could easily abandon their voluntary provision of such benefits. This Court has noted the importance of this balancing:

> [t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Pilot Life, 481 U.S. at 54 (1987). Given that § 510 makes "pension-defeating" claims enforceable under § 502(a), this Congressional rationale, recognized by this Court on the same

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[5] H.R. Rep. No. 93-533, at 1-2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 1639-40 (noted in *Whitaker v. Texaco, Inc.*, 566 F. Supp. 745, 751 n.8 (N.D. Ga. 1983)); *Subcommittee on Labor, Senate Comm. of Labor and Pub. Welfare*, 94th Cong., 2d Sess., *Hearings on the Employee Retirement Income Security Act of 1974*, at 4800 (Comm. Print 1976) (remarks of Senator Nelson), noted in *Whitaker*, 566 F. Supp. at 751 n.8.

day it decided *Metropolitan Life,* applies with equal force to § 510 claims, which typically replace tort-type actions and their various punitive and compensatory damages schemes.

The *Metropolitan Life* decision is not, of course, this Court's first pronouncement on ERISA complete preemption. In *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 25-27 (1983), which Petitioner neglects to mention, this Court recognized that the "*Avco* rule" could be properly applied to support removal in the ERISA context, even when the remedy requested by the plaintiff was available only under state law. *Id.* at 22-23 (citing *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers*, 376 F.2d 337, 340 (6th Cir. 1967), *aff'd*, 390 U.S. 557, 560 (1968)); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557, 560 (1968) (rejecting petitioner's argument that its reliance on state law was determinative of the removal issue). Thus, Petitioner is plainly wrong when he argues that his claim is not subject to the complete preemption rule because he sought only a state-court remedy not provided in § 502(a).

2. *Ingersoll-Rand* Also Recognized that Complete Preemption Applies to ERISA § 510 Claims.

Petitioner also contends that the *Ingersoll-Rand Co. v. McClendon* decision, 498 U.S. 133 (1990), which examined ERISA's complete preemption of, in Petitioner's words, an "analogous state law discrimination claim[]," provides no guidance on complete preemption in this matter. (Pet. 4.) Petitioner is absolutely mistaken.

In *Ingersoll-Rand*, this Court recognized that "pension-defeating motives," such as those alleged by Petitioner, are cognizable under § 510 of ERISA, which specifically prohibits employers from taking adverse action against their employees in order to interfere with their ERISA-protected rights. 498 U.S. at 142-43. Directly addressing the "well-pleaded complaint rule," this Court concluded:

> "Congress was well aware that the powerful pre-emptive force of § 301 of the LMRA displaced" all state-law claims, "even when the state action purported to authorize a remedy unavailable under the federal provisions." *Pilot Life, supra*, at 55, 107 S. Ct., at 1557. In *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987), we again drew upon the parallel between § 502(a) and § 301 of the LMRA to

> support our conclusion that *the pre-emptive effect of § 502(a) was so complete that an ERISA pre-emption defense provides a sufficient basis for removal of a cause of action to the federal forum notwithstanding the traditional limitation imposed by the "well-pleaded complaint" rule.* Id., at 64-67, 107 S. Ct. at 1546-48.

Id. at 144-45 (emphasis added). Thus, *Ingersoll-Rand* strongly supports the proposition that complete preemption applies to all of § 502(a), including § 510 claims enforced pursuant to § 502(a)(3).[6]

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[6] Petitioner's dismisses *Ingersoll-Rand*'s statements as mere dicta. To classify *Ingersoll-Rand*'s elucidation of the *Metropolitan Life* decision in the case as dicta is, in fact, inappropriate and incorrect. The judicial assertions in *Ingersoll-Rand* are not "mere obiter dicta," but rather present "the well-established rationale upon which the Court based the results of its earlier decisions," namely, the rationale set forth in *Metropolitan Life* case. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996). "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Id.* (citations omitted); *see also County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) ("As

(continued...)

3. The *Hazen Paper* Decision Is Inapposite in that It Does Not Address Complete Preemption.

Petitioner invokes this Court's language in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), in support of his claim that the lower court has "effectively rejected the entire prospect of dual liability for age discrimination (or discrimination predicated by membership in any other protected group), *and* under ERISA § 510, arising from the same 'pension-defeating' motive." (Pet. 14-15.)

Petitioner's misstatement in this regard is transparent: although the *Hazen Paper* opinion (which clarified the standard for disparate treatment under the Federal Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA")) considered the appropriate standard for militating between two competing *federal* statutes (ERISA and the ADEA), it explicitly did *not* address the preemptive effect of ERISA over a state-law claim, and is therefore inapposite to the issue at hand.

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[6](...continued)
a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (Kennedy, J., concurring and dissenting).

Fatal to Petitioner's argument based on *Hazen Paper*, moreover, is the single fact that Petitioner never even attempted to bring a *federal* age discrimination claim, and has through his pleadings, cast his case squarely outside the parameters of the discussion in *Hazen Paper*. Consistent with the law of complete preemption, Petitioner cannot argue to allocate his state law claim between federal and state remedies. In any event, there is no conflict among the circuits over whether *Hazen Paper* applies to a state court claim, let alone a claim, such as that presented here, that is devoid of an independent age claim.

B.

THE CASES CITED BY PETITIONER TO DEMONSTRATE A CONFLICT AMONG THE CIRCUITS ARE INAPPOSITE OR IMPLICITLY OVERRULED.

Petitioner misrepresents the law regarding ERISA's complete preemption as conflicted and uncertain. As noted recently in a lower court decision, some question initially arose following *Metropolitan Life* because that case presented a claim covered by § 502(a)(1)(B). *Kalo v. Moen, Inc.*, 93 F. Supp.2d 869, 872 (N.D. Ohio 2000). Commentators therefore questioned "whether the other provisions of [§ 502(a)] have the same completely preemptive effect as subsection [502(a)(1)(B)]." *Id.* In fact, no true conflict developed on this issue, as the lower courts considering

§ 502(a)(1)(B) cases have properly limited their discussion on complete preemption to the issue before them, having no need to apply complete preemption under § 502(a) more broadly. *Id.* (finding that the tendency of many courts to restrict their language to § 502(a)(1)(B) "'is no doubt attributable to the fact that most [ERISA] cases arise under that section,'" as they "involve situations in which an individual seeks to recover plan benefits, enforce his or her rights under a plan, and/or clarify his or her rights to future benefits under a plan") (quoting and citing *C.C. Mid West, Inc. v. McDougall,* 990 F. Supp. 914, 919 (E.D. Mich. 1998)). Speculation of commentators aside, the lower court decisions limited to determining removal of § 502(a)(1)(B) claims hardly create a conflict regarding an issue these decisions *did not* address. In any event, no such conflict arises from the cases cited by Petitioner.

Petitioner relies extensively on the Sixth Circuit decision, *Warner v. Ford Motor Co.*, 46 F.3d 531 (6th Cir. 1995), for evidence of a circuit split on the issue of complete preemption. Not only is *Warner* fundamentally distinguishable, both factually and legally, but, to the extent that dicta in *Warner* suggested that complete preemption might be limited to § 502(a)(1)(B), it has been implicitly overruled by the more recent decision of the Sixth Circuit in *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999).

In *Warner*, the plaintiff brought an action for age discrimination in violation of Michigan state law. *Warner*, 46

F.3d at 533. Specifically, the plaintiff claimed "that the defendant-employer threatened to discharge the plaintiff because of his age unless he took early retirement." *Id.* at 534. Thus, the court of appeals properly found that the plaintiff had stated "a straight state age discrimination case which has no counterpart or superseding cause of action in ERISA." *Id.* Accordingly, ERISA was not implicated and preemption removal was not at issue. The *Warner* court discussed *Metropolitan Life* in dicta solely in order to resolve a conflict *within* the Sixth Circuit as to the distinction between ordinary preemption under ERISA § 514, which does not convert a state claim into an action arising under federal law, and complete preemption involving the § 502 enforcement scheme, which creates a federal claim for removal purposes. *Id.* at 535 ("[r]emoval and preemption are two distinct concepts").

More recently, the Court of Appeals for the Sixth Circuit in *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999), considered a claim arguably covered by ERISA's prohibition against breach of fiduciary duty (§ 502(a)(2)). The *Smith* court noted:

> Neither the Supreme Court nor this court has expressly extended this complete preemption doctrine to claims for breach of fiduciary duty, which fall under [§ 502(a)(2)], not [§ 502(a)(1)(B)]. However, we see little reason to distinguish between the two

> provisions. ERISA is at least as concerned with defining and standardizing the duties of a fiduciary as it is with providing for recovery of benefits.

Id. (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251-53 (1993)). Accordingly, Petitioner's posit of a conflict on this issue, raising false alarm that such conflict will proliferate, is not borne out by the developing law of the Sixth Circuit itself, which does not present a conflict or any issue ripe for review by this Court.

Finally, Petitioner places great emphasis on the *Rokohl v. Texaco, Inc.* decision by the Court of Appeals for the Fifth Circuit, as evidence of a circuit split. 77 F.3d 126 (5th Cir. 1996). Like *Warner*, the *Rokohl* decision is fundamentally distinguishable from the instant case. First, Petitioner concedes that *Rokohl* does not address complete preemption, but rather only "ordinary" preemption under ERISA § 514,[7] discussed *supra*. (Pet. 5.) Petitioner's insistence that this Court somehow find dissension among the circuit courts based

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[7] Indeed, the *Rokohl* decision did not even make passing mention of complete preemption and made note of the fact that the *Rokohl* action was "removed to federal district court on *diversity grounds*." 77 F.3d at 128 (emphasis added) (footnote omitted).

on a case completely devoid of discussion on the singular issue on petition is simply puzzling.

Even assuming, *arguendo*, that *Rokohl* had considered the issue of complete preemption, that decision, like *Warner*, is distinguishable from the instant case on the critical fact that the complaint in *Rokohl* stated an independently viable wrongful termination claim, in addition to an ERISA claim. *Rokohl*'s wrongful termination claim "would pertain even if [the employer] had not maintained an ERISA plan at all." *Rokohl,* 77 F.3d at 130. In contrast, Petitioner's Complaint asserts a pension-defeating motive and no other.

Moreover, both prior and subsequent to the *Rokohl* decision, the Court of Appeals for the Fifth Circuit has explicitly addressed the question of whether claims such as Petitioner's § 510 claim are completely preempted. *See Kramer v. Smith Barney*, 80 F.3d 1080, 1083-84 (5th Cir. 1996); *Anderson v. Electronic Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir.), *cert. denied*, 513 U.S. 808 (1994). Not surprisingly, the Fifth Circuit has joined every other circuit to have considered the issue by concluding, based on *Metropolitan Life* and *Ingersoll-Rand*, that claims arising under § 502(a) are subject to complete preemption. *Kramer*, 80 F.3d at 1084; *Anderson*, 11 F.3d at 1315.

After *Rokohl*, *supra*, Petitioner offers only scattered district courts' opinions in support of his claim of lower court "uncertainty" following *Metropolitan Life*. Like *Rokohl* and

Warner, these cases are inapposite because Petitioner has not pleaded an independent age discrimination claim. *See, e.g., Kalo v. Moen Inc.*, 93 F. Supp.2d 869, 874 (N.D. Ohio 2000) (finding state law age claim not completely preempted where claim "does not hinge on the theory that [defendant] was attempting to prevent [plaintiff] from obtaining plan benefits," but rather "set forth specific allegations of disparate treatment based exclusively on discriminatory animus"); *Miller v. Exxon Corp.*, No. Civ. A. 98-2441, 1998 WL 781592, at *2 (E.D. La. Nov. 10, 1998) (unreported) (granting motion to remand state law age claim where plaintiff stated a "'straightforward age discrimination claim'" . . . "regardless of whether [her employer] maintained an ERISA-qualified retirement plan") (quoting *Donald v. Virginia Elec. & Power Co.*, 7 F. Supp.2d 694, 698 (E.D.N.C. 1998)); *Donald*, 7 F. Supp.2d at 698 (granting motion to remand a straight state age discrimination case which did not "depend upon, or even relate to, the existence of an ERISA benefits plan"); *Smith v. Cohen Benefit Group, Inc.*, 851 F. Supp. 210, 213 (M.D.N.C. 1993) (granting motion to remand state law claims "which would exist if the Plan never came into existence").

In contrast, but not in conflict, with the foregoing cases, the Court of Appeals for the Third Circuit noted the unique fact pattern presented to it, and limited its holding accordingly, stating "[w]e agree with the District Court when it noted: 'Aside from nearing early retirement age, there are no facts alleged in the Complaint to support a claim that Wood's age had any bearing on Prudential's decision to

terminate him.'" *Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674, 677 (3d Cir. 2000) (Pet. 4a-5a).

C.

PETITIONER'S CLAIM IS NOT IMMUNIZED FROM COMPLETE PREEMPTION BY HIS CHOICE OF REMEDIES.

Although Petitioner admits that he "openly plead[ed] Prudential's 'pension-defeating motive,'" (Pet. 9), which pleading falls squarely within the ambit of § 510, he asserts that his claim is not completely preempted by § 502(a), because he is not seeking any of the relief provided by that section, (Pet. 8-14). This argument flouts the basic principles established by this Court under the complete preemption doctrine. As this Court has noted, the careful crafting of ERISA's enforcement scheme is "'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

Although a *replacement* federal cause of action must be present for complete preemption to exist, it is not necessary that cause of action provide *the exact remedy* sought by the plaintiff in his state-law action. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S.

557, 560-61 (1968). "The fact that ERISA does not provide the *remedy* [Petitioner] 'seek[s] is not relevant; all that matters is that the *claim* be within the scope of § 502(a)." *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 5 n.4 (1st Cir. 1999) (citing *Pilot Life Ins.*, 481 U.S. at 54-55) (finding a claim for improper processing of benefits fell within § 502(a), even though the remedy sought was not authorized by ERISA).

As *Metropolitan Life* teaches, the test for complete preemption is not whether ERISA provides a cause of action identical to the state law action being preempted, but whether that state law action is "within the scope of the civil enforcement provisions of § 502(a)." *Metropolitan Life*, 481 U.S. at 66-67. In *Metropolitan Life*, this Court found that Taylor's state law claims, including a claim for wrongful termination, were all properly removed even though ERISA does not provide a cause of action identical to any of his state law claims. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144-45 (1990); *Metropolitan Life*, 481 U.S. at 66-67; *Pilot Life*, 481 U.S. at 56.

In *Ingersoll-Rand*, this Court again rejected the same argument – that the petitioner was not seeking any of the specific relief provided by § 502(a) – stating:

> there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits' . . . . Consequently, it

> is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

Ingersoll-Rand Co., 498 U.S. at 145.[8]

There is no controversy among the circuit courts over the delineation of this principle, and Petitioner cites none.

CONCLUSION

Absent any facts alleged in the Complaint to support a claim that Petitioner's age was the basis of the decision to terminate him, Petitioner's claim under state age discrimination law pleads a uniquely pension-defeating motive, which is exclusively and unambiguously within the ambit of § 510 of ERISA. The application of complete preemption by the court below to Petitioner's pension-defeating claim, based on the settled principles of

---

[8] This Court has explicitly rejected the argument that ERISA should not preempt state law to the extent that employees have less protection than they did before ERISA was enacted. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261-62 (1993) (ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs") (citing *Pilot Life*, 481 U.S. at 54-56).

Metropolitan Life and *Ingersoll-Rand,* creates no conflict among the circuit courts of appeals and raises no issue of law ripe for review by this Court. Accordingly, the Petition seeks no more than a further appellate review of the decision of the court below based on facts unique to this case. On this basis, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUNTERDON COUNTY
DOCKET NO.: L-179-98
Civil Action

JAMES W. WOOD,

Plaintiff

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant

COMPLAINT AND JURY DEMAND

The plaintiff, James Wood, residing at 30 Rittenhouse Circle, Flemington, Hunterdon County, New Jersey by way of Complaint against the defendant, The Prudential Insurance Company of America, says that:

1. Plaintiff was employed by defendant, The Prudential Insurance Company of America (hereinafter "Prudential,"), for a period of approximately 23 years, from June of 1974 through May of 1997. During this time, the plaintiff was employed both as an insurance agent, and as an insurance sales manager. Throughout this entire 23 year period, the plaintiff obtained a variety of awards and distinctions, and was recognized accordingly, on various occasions, as a distinguished and highly successful member of the Prudential insurance sales, and sales management staff.

2. Nevertheless, in early 1996, the plaintiff learned that he was being "investigated" by defendant Prudential. Then, in May of 1997, he received the letter attached hereto as Exhibit A, purporting to terminate his employment with defendant Prudential because of his alleged "violations" of company policy, in connection with the sale of insurance. In pertinent part, this letter accused Mr. Wood, inter alia, of misappropriating approximately twelve hundred dollars, from money that was paid to him by a client, as a payment of premiums due on the client's insurance policy.

3. Nevertheless, defendant Prudential either knew, or recklessly failed to learn, that the funds in question were *not* misappropriated, but had been deposited by defendant Prudential into its own bank account. Additionally, the remaining alleged violations were either false as well, and completely fabricated, or grossly exaggerated, and were merely a pretext for the real reason that the defendant decided to terminate the plaintiff's employment.

4. In fact, the real reason that defendant Prudential terminated the employment of the plaintiff was its knowledge that, because he was fifty-one years old, and had more than twenty years of service with Prudential, plaintiff Jim Wood was about to become eligible for full retirement benefits. Defendant Prudential knew that the vesting of those benefits would require it to continue to be responsible for the medical expenses of the plaintiff and of his dependents, including the plaintiff's son, Matthew Wood.

5. Significantly, in December of 1991, the plaintiff's son, Matthew Wood, was involved in a serious automobile accident, and sustained serious personal injuries, including severe head and brain injuries, that have required extremely expensive and intensive medical treatment and rehabilitation therapy, costing millions of dollars. Because the plaintiff was nearing retirement age, and in fact defendant Prudential was planning to lower the early

retirement age, the defendant knew that, unless it terminated the employment of plaintiff James W. Wood *before* he was eligible for retirement, upon his retirement its obligation to provide for the medical expenses of the plaintiff's son, Matthew, would become permanent, and continue throughout Matthew's entire lifetime, thereby costing defendant Prudential, in all likelihood, additional millions of dollars to cover his medical expenses. By terminating the employment of plaintiff James W. Wood *before* he reached early retirement age, defendant Prudential was able to reduce any further obligation to fund the medical expenses of his son, Matthew Wood, to a period of only 18 months, as required under "COBRA" coverage for terminated employees, and to deprive the plaintiff of other retirement benefits he would be entitled to, upon reaching retirement age.

6. Moreover, upon information and belief, shortly after the defendant terminated the employment of plaintiff James W. Wood, it provided a copy of the termination letter attached hereto as Exhibit A, to the Department of Insurance of the State of New Jersey. Alternatively, and/or in addition thereto, defendant Prudential provided to the New Jersey Department of Insurance another written document describing the same violations alleged in the letter attached hereto as Exhibit A, including the allegation that plaintiff James W. Wood had misappropriated twelve hundred dollars belonging to an insurance client. In fact, however, defendant Prudential

knew, or should have known that plaintiff James W. Wood did *not* misappropriate any funds, and in fact the funds in question had been in the bank account of defendant Prudential all along. Nevertheless, in reckless disregard for the true facts, defendant Prudential proceeded to accuse plaintiff James Wood of misappropriating the funds in question, and proceeded to terminate the plaintiff's employment, and to provide the State of New Jersey, and/or other authorities with false information, and false allegations of wrongdoing on the part of Mr. Wood, despite its knowledge of the true facts. Upon information and belief, defendant Prudential still has taken no steps whatsoever to remedy its publication, and/or circulation of information falsely accusing the plaintiff of misappropriating the funds of an insurance client, and of its other alleged "violations."

FIRST COUNT

7. Plaintiffs repeat the allegations of paragraphs #1 through #6 of this Complaint, as if more fully set forth herein.

8. Defendant's conduct was willful, wanton, intentional, and malicious, and engaged in with wanton and willful disregard for the welfare of plaintiff James W. Wood, and of his legal rights.

9. Plaintiff's age was a determinative factor in Defendant's harassment, and callous treatment of the plaintiff in the final year of his employment with Defendant, and in its ultimate termination of plaintiff as described herein. Defendant's conduct as hereinabove set forth constituted discrimination against the plaintiff on the basis of age, in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

WHEREFORE plaintiff demands judgment against defendant Prudential for:

a. Payment for lost wages and benefits;
b. Compensatory damages;
c. Damages for humiliation, pain and suffering;
d. Punitive damages;
e. Prejudgment interest;
f. Costs and disbursements, including reasonable attorney's fees; and
g. Such other relief as the Court deems just and proper.

SECOND COUNT

10. Plaintiff repeats each and every allegation of Paragraphs #1 through #9 as if set forth at length herein.

11. Defendant's conduct as hereinabove described was defamatory, constituted libel and slander, and

has resulted in the defamation of the plaintiff, James W. Wood, by the circulation of false allegations accusing the said plaintiff of misappropriating funds, and other alleged "violations" of law which were in fact either false, or the direct result of his compliance with the policies which defendant insisted that its sales agents implement, and follow in connection with the sale of insurance in New Jersey.

12. The actions of defendant Prudential in circulating and publicizing the false accusations of wrongdoing on the part of the plaintiff, James W. Wood, were wanton, willful, malicious, intentional, and made with wanton disregard for the truth, and wanton disregard for the welfare of the plaintiff, and his dependents, including his son, Matthew Wood.

WHEREFORE plaintiff, James W. Wood demands judgment against defendant Prudential for:

a. Payment for lost wages and benefits;
b. Compensatory damages;
c. Damages for humiliation, pain and suffering;
d. Punitive damages;
e. Prejudgment interest;
f. Costs and disbursements, including reasonable attorney's fees; and
g. Such other relief as the Court deems just and proper.

THIRD COUNT

13. Plaintiff repeats each and every allegation of Paragraphs #1 through #12 as if set forth at length herein.

14. The actions of defendant Prudential were outrageous, by reason of the defendant's use of false and defamatory allegations of wrongdoing as a pretext for the termination of plaintiff, after almost twenty-five years of employment, and its efforts to deprive plaintiff and his dependents of retiree benefits including, inter alia, retiree medical insurance coverage which defendant Prudential knew full well was desperately needed by plaintiff and his dependents.

15. The outrageous conduct of defendant Prudential constitute the tort of outrageous misconduct, and entitles plaintiff to an award of punitive damages, as well as compensatory damages for the emotional distress caused by such wrongdoing.

WHEREFORE plaintiff James W. Wood, demands judgment against defendant Prudential for:

a. Payment for lost wages and benefits;
b. Compensatory damages;
c. Damages for humiliation, pain and suffering;
d. Punitive damages;
e. Prejudgment interest;
f. Costs and disbursements, including

reasonable attorney's fees; and

g. Such other relief as the Court deems just and proper.

FOURTH COUNT

16. Plaintiff repeats each and every allegation of Paragraphs #1 through #15 as if set forth at length herein.

17. The actions of defendant Prudential complained of herein were in violation of the New Jersey Constitution of 1947, Art. I, ¶ 1.

JURY DEMAND

Plaintiff requests a trial by jury on all issues raised in his Complaint, which are triable by jury.

CERTIFICATION

Pursuant to Rule 4:5-1, the undersigned certifies that the matter in controversy is not the subject of any other action pending in any other court or of a pending arbitration proceeding, nor is any other action or arbitration proceeding contemplated.

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-1, G. Martin Meyers, Esq. is hereby designated as trial counsel in the within litigation.
Dated: March 18, 1998

MEYERS & MILEWSKI, P.C.

By: s/_____
G. Martin Meyers, Esq.
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Hon.
Civil No. 98-CV-2487 (AET)
Civil Action

JAMES WOOD and KAREN WOOD, individually and as Guardians ad Litem of MATTHEW WOOD, incompetent,

Plaintiffs,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant.

COMPLAINT AND JURY DEMAND

James Wood and Karen Wood, individually and as Guardians ad Litem for the legally incompetent plaintiff Matthew Wood, who is disabled, by way of Complaint against the defendant, The Prudential Insurance Company of America, say that:

I. JURISDICTION AND VENUE

1. Plaintiffs James Wood, Karen Wood and Matthew Wood are residents of the State of New Jersey, residing at 30 Rittenhouse Circle, Flemington, Hunterdon County, New Jersey. Defendant Prudential Insurance Company of America ("Prudential") is a corporation with its principal place of business in this district. This action is brought pursuant to 29 U.S.C.A. § 1132, which provides for exclusive jurisdiction in the federal courts for actions arising under the Employee Retirement Income Security Act of 1974 ("ERISA").

2. Venue in this matter is proper in this district court in that defendant Prudential Insurance Co. of America transacts business in this district, and maintains its principal place of business in Newark, NJ.

II. FACTUAL ALLEGATIONS

3. Plaintiff was employed by defendant, The Prudential Insurance Company of America (hereinafter "Prudential"), for a period of approximately 23 years, from June of 1974 through May of 1997. During this time, the plaintiff was employed both as an insurance agent, and as an insurance sales manager. Throughout this entire 23 year period, the plaintiff obtained a variety of awards and distinctions, and was recognized accordingly, on various occasions, as a distinguished and highly successful member of the Prudential insurance sales, and sales management staff.

4. Nevertheless, in early 1996, the plaintiff learned that he was being "investigated" by defendant Prudential. Then, in May of 1997, he received the letter attached hereto as Exhibit A, purporting to terminate his employment with defendant Prudential because of his alleged "violations" of company policy, in connection with the sale of insurance. In pertinent part, this letter accused Mr. Wood, inter alia, of misappropriating approximately twelve hundred dollars, from money that was paid to him by a client, as a payment of premiums due on the client's insurance policy.

5. Defendant Prudential either knew, or recklessly failed to learn, that the funds in question were *not* misappropriated, but had been deposited by defendant

Prudential into its own bank account. Additionally, the remaining alleged violations were either false as well, and completely fabricated, or grossly exaggerated, and were merely a pretext for the real reason that the defendant decided to terminate the plaintiff's employment.

6. In fact, the real reason that defendant Prudential terminated the employment of the plaintiff was its knowledge that, because he was fifty-one years old, and had more than twenty years of service with Prudential, plaintiff Jim Wood was about to become eligible for full retirement benefits. Defendant Prudential knew that the vesting of those benefits would require it to continue to be responsible for the medical expenses of the plaintiff and of his dependents, including the plaintiff's son, Matthew Wood.

7. Significantly, in December of 1991, the plaintiff's son, Matthew Wood was involved in a serious automobile accident, and sustained serious personal injuries, including severe head and brain injuries, that have required extremely expensive and intensive medical treatment and rehabilitation therapy, costing millions of dollars. Because the plaintiff was nearing retirement age, and in fact defendant Prudential was planning to lower the early retirement age, the defendant knew that, unless it terminated the employment of plaintiff James W. Wood *before* he was eligible for retirement, upon his retirement its obligation to provide for the medical expenses of the plaintiff's son,

Matthew, would become permanent, and continue throughout Matthew's entire lifetime, thereby costing defendant Prudential, in all likelihood, additional millions of dollars to cover his medical expenses. By terminating the employment of plaintiff James W. Wood *before* he reached early retirement age, defendant Prudential was able to reduce any further obligation to fund the medical expenses of his son, Matthew Wood, to a period of only 18 months, as required under "COBRA" coverage for terminated employees, and to deprive the plaintiff of other retirement benefits he would be entitled to, upon reaching retirement age.

8. As the wife and son, respectively, of plaintiff James Wood, plaintiffs Karen Wood and Matthew Wood are and at all times relevant hereto were, beneficiaries of the employee retirement plans, and employee retirement benefits which defendant Prudential Insurance Company wrongfully withheld from plaintiff James Wood, and of the medical benefits which plaintiff James Wood would have attained had he been allowed to retire by defendant.

FIRST CLAIM

9. Plaintiffs repeat the allegations of paragraph #1 through #6 of this Complaint, as if more fully set forth herein.

10. Defendant's conduct was willful, wanton,

intentional, and malicious, and engaged in with wanton and willful disregard for the welfare of plaintiff James W. Wood, and of his legal rights in violation of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C.A. § 1001 et seq., and intentionally designed to interfere with his attainment of retirement benefits he was clearly entitled to receive.

WHEREFORE plaintiffs demand judgment against defendant Prudential for:

a. Restitution of all medical and retirement benefits due and improperly denied to plaintiff under his benefits contract with defendant;

b. Declaratory judgment setting forth plaintiff's future rights under the terms of his benefits plan with defendant;

c. An Order of this Court enjoining any and all violations of plaintiff's rights under ERISA by defendant;

d. Enforcement of all of plaintiff's rights under his benefits plan and under ERISA; and

e. Such other relief as is available under 29 U.S.C.A. § 1001 et seq. or which the Court

deems just and proper.

SECOND CLAIM

11. Plaintiffs repeat each and every allegation of Paragraphs #1 through #13 as if set forth at length herein.

12. Defendant's conduct as hereinabove set forth constituted discrimination against plaintiff Matthew Wood, incompetent, beneficiary of the medical and retirement benefits complained of herein, on the basis of his serious and ongoing mental and physical disability, in violation of the Americans with Disability Act (ADA), 42 U.S.C.A. § 12101 et seq., as amended.

WHEREFORE plaintiffs demand judgment against defendant Prudential for:

a. Payment for lost wages and benefits;
b. Compensatory damages;
c. Damages for humiliation, pain and suffering;
d. Punitive damages;
e. Prejudgment interest;
f. Costs and disbursements, including reasonable attorney's fees; and
g. Such other relief as may be available under 42 U.S.C.A. § 12101 et seq., and 29 U.S.C.A. § 1001 et seq., or which the Court deems just and proper.

JURY DEMAND

Plaintiffs request a trial by jury on all issues, raised in this Complaint, which are triable by jury.

Dated: May 26, 1998

MEYERS & MILEWSKI, P.C.

By: s/_____

G. Martin Meyers, Esq.
Attorney for Plaintiff
5833

Supreme Court, U.S.
FILED
SEP 18 2000
CLERK

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No. 00-181

In the

Supreme Court of the United States

JAMES W. WOOD,

Petitioner,

versus

PRUDENTIAL INSURANCE COMPANY OF AMERICA; JAMES W. WOOD; KAREN WOOD, individually and as Guardians of MATTHEW WOOD, incompetent v. PRUDENTIAL INSURANCE COMPANY OF AMERICA; James Wood; Karen Wood, individually and as guardians of Matthew Wood, incompetent

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Brief filed by Respondent in Opposition to the pending Petition for A Writ of Certiorari only underscores the uncertainty and confusion surrounding the application of ERISA "complete preemption" principles to facts like those presented here, and the need for this Court's clarification of those principles.

SUMMARY OF REPLY ARGUMENT

Respondents' entire Opposition Brief is predicated upon a misstatement of the question presented for review, which Respondent describes as the issue of whether an ERISA § 510 claim, which falls within the civil enforcement provisions of ERISA § 502(a), is subject to "complete preemption." See, e.g., Opposition Brief, at 6-7. But the real question presented is whether every state law age discrimination claim potentially subject to a defense of "ordinary preemption" under ERISA § 510, because it alleges a "pension-defeating" motive, can be *automatically* considered to be "within the civil enforcement provisions of ERISA § 502(a)" on that same basis, regardless of the nature of the action in which it is asserted or the nature of the relief requested. Petition at i. Once Respondent's subtle distortion of the question presented is revealed, the hollow nature of its effort to demonstrate the "uniformity" of the circuit courts on this important jurisdictional issue is immediately revealed as well.

For example, by avoiding the real question presented for review, and focusing instead upon the question as misstated in its Opposition Brief, Respondent is able to create the appearance of "uniformity", where in fact there is none, by pointing to circuit court cases which *do not even involve* either a state court claim of age discrimination, or allegations of the type of "pension-defeating" motive asserted in Petitioner's state law complaint in this case.

Respondent also contends that Petitioner's reliance upon the Sixth Circuit's ruling in *Warner v. Ford Motor Co.*, 46 F.3d 531 (6th Cir. 1995), is misplaced, because *Warner* is "fundamentally distinguishable, both factually and legally," and because *Warner* has been "implicitly overruled" by the Sixth Circuit's more recent decision in *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999). Opposition Brief at 17. But these contentions are refuted by another of Respondent's own cases, *Kalo v. Moen, Inc.*, 93 F. Supp. 2d 869 (N.D. Ohio 2000), which found that a cause of action *almost identical* to the age discrimination claim asserted by Petitioner in this case was *not* subject to "complete preemption," and therefore non-removable in light of *Warner*. *Id.* at 873. This ruling actually serves to reaffirm *Warner's* continued viability in the Sixth Circuit on the ERISA "complete preemption" issue.

Moreover, rather than "implicitly overruling" *Warner* on any issue, the Sixth Circuit's decision in *Smith v. Provident Bank*, 170 F.3d 609, simply analogizes ERISA actions predicated upon alleged breaches of fiduciary duty by an ERISA fiduciary to actions seeking recovery of pension benefits, for "complete preemption" purposes. *Id.* at 613. Most importantly, however, the state law claims asserted by Petitioner here do not fall into *either* of these classifications, and for this reason clearly would not be subject to "complete preemption" under prevailing law in the Sixth Circuit pursuant to its ruling in either *Warner* or *Smith v. Provident Bank*.

By the same token, Respondent contends that Petitioner's reliance upon the Fifth Circuit's ruling in *Rokohl v. Texaco, Inc.*, 77 F.3d 126 (5th Cir. 1996) is "puzzling," because *Rokohl* was a case of "ordinary preemption," which did not even discuss the "complete preemption" issue. Opposition Brief at 19-20. What Respondent fails to mention, of course, is that its own reliance (and that of the majority in the court below), on the Supreme Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133

(1990), is equally "puzzling" for precisely the same reason. In fact, because *Ingersoll-Rand* was an "ordinary preemption" case, even though it mentioned in *dicta* the "complete preemption" issue, there is simply no basis for the conclusion that this Court intended to apply the ruling of that decision to the entirely separate "complete preemption" issue. Respondent also fails to mention that where a defense of "ordinary preemption" is rejected, as was done by the Fifth Circuit in *Rokohl* (in a case directly analogous to the case at bar), it follows **a fortiori** that "complete preemption" would have been ruled inapplicable as well. Cf., *Romney v. Lin*, 94 F.3d 74, at 80 ("complete preemption" requires a finding of ordinary preemption, *as well as* a finding that a cause of action is "within the scope of ERISA § 502(a)").

Finally, Respondent relies heavily upon the alleged absence of "additional allegations" in Petitioner's state court complaint, to demonstrate an alternative, or "independent" basis for his state law age discrimination claim, in addition to the "pension-defeating" motive asserted. Opposition Brief, at 21. But in his state court complaint Petitioner specifically alleged that "[p]laintiff's age was a determinative factor in Defendant's harassment, and callous treatment of the plaintiff in the final year of his employment with Defendant, and in its ultimate termination of plaintiff as described herein." Petitioner's state law complaint, Opposition Brief, Appendix, at 3A, ¶ 4.

No greater specificity is required for pleading a claim of age discrimination in New Jersey Superior Court, and this Court's own recent ruling in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160 (1993), struck down efforts to require pleading specificity, beyond the "notice pleading" required by Rule 8(a)(2), Fed. R. Civ. P., for analogous civil rights claims brought under federal law. *Leatherman*, 507 U.S. at 168. It would be anomalous indeed for this Court to hold that a state law claim of age discrimination was subject to "complete preemption," and therefore completely "displaced"

by ERISA § 510, by virtue of its failure to provide the type of pleading "specificity" that would never have been required had it been filed in federal district court to begin with.

For all of these reasons, and on the basis of the Argument set forth below, Respondent's effort to forestall resolution of the uncertainty and confusion surrounding the issues presented here should be rejected, and the pending Petition for A Writ of Certiorari should be granted.

ARGUMENT

A. RESPONDENT HAS FAILED TO DEMONSTRATE THE "UNIFORMITY" OF THE CIRCUIT COURTS ON THE QUESTION PRESENTED FOR REVIEW.

Respondent cites four circuit court cases in an effort to demonstrate the "uniformity" of the circuit courts on the question presented for review. Opposition Brief, at 7. But the cases cited by Respondent are totally inapposite, because they involve facts and claims which do not even remotely resemble those presented here.

1. Respondent's Cases Do Not Demonstrate The Uniformity of the Circuit Courts On the Question Presented For Review.

First, Respondent cites *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, *as amended*, 208 F.3d 1170 (9th Cir. 2000), a case seeking recovery of excessive legal fees charged *directly* to a pension plan, in a suit *filed by an ERISA plan trustee*. Unlike the instant case, involving claims with *no potential impact whatsoever* on any ERISA plan, the direct impact of the claims asserted in *Rutledge* upon the ERISA plan at issue in that case could hardly be clearer. Moreover, *Rutledge* involves no

allegations of a "pension-defeating" motive for any action taken, and no state law age discrimination claim.

Similarly, Respondent cites *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999), a suit *filed by an ERISA plan, against a former plan trustee*, for recovery of plan assets allegedly misappropriated or lost, which charged that the defendant had "breached its fiduciary duty as the trustee of an ERISA plan," and "sought to clarify [a participant's] rights and recover benefits due under an ERISA plan..." *Id.* at 612. Like *Rutledge*, the claims asserted in the *Smith* case directly impact an ERISA plan, and also involve no allegations of a "pension-defeating" motive for any action taken, and no state law age discrimination claim.

As a further demonstration of "uniformity" on the question presented for review, Respondent also cites *Romney v. Lin*, 94 F.3d 74 (2d Cir. 1996), a case holding that claims brought under a New York statute specifically designed to enable employees to enforce a corporation's pension funding obligations against the corporation's ten largest shareholders, were "completely preempted" by ERISA. Like the *Rutledge* and *Smith* cases, the claims in *Romney* also directly impact ERISA plans, together with their existing or potential assets, and *Romney* involves no allegations of a "pension-defeating" motive for any action taken, and no state law age discrimination claim. Indeed, given their dramatic factual dissimilarities, Respondent's citation of *Rutledge*, *Romney* and *Smith*, in an effort to demonstrate "uniformity" on the question presented for review here is incomprehensible.

The *only* circuit court case cited by Respondent which involves allegations that are even related to ERISA § 510 is *Anderson v. Electronic Data Servs. Corp.*, 11 F.3d 1311 (5th Cir.), *cert. denied*, 513 U.S. 808 (1994). *Anderson* is also easily distinguishable from the case at bar, however, because the employee in that case was discharged from his position as administrator of pension investments totaling approximately $1.3 billion dollars, for his alleged refusal to engage in conduct with respect to these pension assets, in

violation of the ERISA statute. *Id.* at 1312. The direct relationship between the claims of the plaintiff in *Anderson* to the ERISA pension plans at issue in that case, and the potential impact of the conduct complained of in *Anderson* upon ERISA plan assets, could hardly be more obvious or more direct, and also involves a situation far afield from the facts presented here. *Id.*

In short, not only do Respondent's circuit court cases fail to demonstrate "uniformity," they fail to even touch upon the question presented for review.

2. *Warner v. Ford Motor Co.* Remains Good Law in the Sixth Circuit, And Applies Directly To The "Complete Preemption" Issue Presented Here.

Respondent also contends that the Sixth Circuit's ruling in *Warner v. Ford Motor Co.*, 46 F.3d 531 (6th Cir. 1995) is "fundamentally distinguishable, both factually and legally," and that *Warner* has been "implicitly overruled" by the Sixth Circuit's more recent decision in *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999). Opposition Brief, at 17. Nevertheless, another case cited by Respondent, *Kalo v. Moen, Inc.*, 93 F. Supp. 2d 869 (N.D. Ohio 2000), directly refutes both of these contentions.

In *Kalo*, the district court considered the removability of a state law age discrimination claim almost identical to Petitioner's age discrimination claim under the New Jersey Law Against Discimination ("NJLAD") in the case at bar. The *Kalo* plaintiff's claim was based upon his allegation that "it was improper for Moen to terminate him when he was only a year away from being eligible for early retirement, and only six years away from being fully vested in his pension plan." *Id.* at 873; cf., Petitioner's state law complaint, Opposition Brief, Appendix, at 3A, ¶ 4. ("...because he was fifty-one years old, and had more than twenty years of service with Prudential, plaintiff Jim Wood was about to become eligible for full retirement benefits."). Citing *Warner*

v. Ford Motor Co., 46 F.3d 531, the district court concluded that the directly analogous age discrimination claim before it in *Kalo v. Moen, Inc.*, was not removable:

> Kalo does not dispute that the benefits referred to in his complaint are associated with an ERISA-governed plan. He argues, however, that ERISA does not displace his state age discrimination claim in light of the Sixth Circuit's decision in *Warner*. This Court agrees.

Kalo v. Moen, Inc., 93 F. Supp. 2d 869, at 873 (emphasis supplied).

Although the district court went on to determine that a public policy claim asserted by the plaintiff in *Kalo* was removable, there was no "public policy" claim asserted by Petitioner in his state court complaint in the instant case. See Opposition Brief, Appendix, 1A-10A. Thus, the ruling by the district court in *Kalo* confirms that Petitioner's reliance upon the Sixth Circuit's ruling in *Warner* to demonstrate the conflict in the circuits on the issue presented here was entirely appropriate. Cf., *Kalo v. Moen, Inc.*, 93 F. Supp. 2d 869, at 873-874. The *Kalo* court's own reliance upon *Warner v. Ford Motor Co.*, 46 F.3d 531, and its reference to *Warner* as the "leading case on complete ERISA preemption" (*Kalo*, 93 F. Supp. 2d at 872), only underscores this conclusion, and further demonstrates the manner in which the conflict among the circuits identified by Petitioner has permeated the federal caselaw.

Respondent is also wrong in its contention that *Warner* was "implicitly overruled" by *Smith v. Provident Bank*, 170 F.3d 609, in its holding that complete preemption was limited to claims falling under § 502(a)(1)(b). In fact, *Smith v. Provident Bank* simply held that claims for breach of fiduciary duty, which fall under § 502(a)(2), might also be

subject to "complete preemption," because "...we see little reason to distinguish between the two provisions. ERISA is at least as concerned with defining and standardizing the duties of a fiduciary as it is with providing for recovery of benefits." *Smith v. Provident Bank*, 170 F.3d 609, at 613. In the instant case, where no claim for breach of fiduciary duty is involved, and it is undisputed that Petitioner's state law claims did not seek "recovery of benefits," the Sixth Circuit's ruling in *Smith v. Provident Bank* has no bearing whatsoever on the issues presented, and does not negate the direct applicability of *Warner* in any way.

B. HIS STATE LAW COMPLAINT WAS NOT REQUIRED TO ALLEGE ALL POSSIBLE GROUNDS FOR PETITIONER'S AGE DISCRIMINATION CLAIM.

In its Opposition Brief, Respondent repeatedly contends that removal of Petitioner's state court complaint was justified, because he did not plead "an independent age discrimination claim." See, e.g., Opposition brief at 21.

In fact, however, Petitioner *did* plead an independent age discrimination claim, in the very FIRST COUNT of his state law complaint. See, e.g., Opposition Brief, Appendix, 1A-10A, ¶'s 1, 4, 7-9. Respondent's argument to the contrary implicitly suggests that Petitioner was required to plead his state law age discrimination claim with greater specificity, in order to avoid application of the "complete preemption" doctrine employed by the district court to completely "displace" his age discrimination claim even *before* any discovery was completed.

Nevertheless, Respondent cites no case that would require Petitioner to plead his state law age discrimination claim with greater specificity. On the contrary, New Jersey courts follow federal law on all issues relating to state law discrimination claims, and in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163,

113 S.Ct. 1160 (1993), this Court made it clear that the "notice pleading" standards of Rule 8 (a)(2), Fed. R. Civ. P., are applicable to such claims, and they cannot be subjected to heightened pleading standards. *Id.*, 507 U.S. at 168.

These pleading principles also serve to highlight the importance of this Court preserving the distinction between "ordinary preemption" and "complete preemption" in cases like this one, rather than permitting that distinction to be obliterated by "complete preemption" rulings like that of the Third Circuit here. Clearly, the completion of discovery in state court could reveal the presence of motives for age discrimination claims like that complained of by Petitioner, which are *entirely* separate and apart from a "pension-defeating" motive that may be alleged in a state court complaint. If such separate motives are *not* revealed, defendants would still be free to interpose the defense of "ordinary preemption," pursuant to ERISA § 510. However, by employing ERISA "complete preemption" principles at the pleading stage, to entirely "displace" a state law age discrimination claim *before* any discovery with respect to that claim has even been completed, the victims of such discrimination are arbitrarily deprived of *any* opportunity to prove the existence of what may be *bona fide*, and entirely independent state law age discrimination claims. Such drastic action, solely on the basis of the "reading" of complaints never intended in the first place to do more than provide "notice" of the claims asserted, by courts who can only speculate about the real facts behind such pleadings (Cf., *Wood v. Prudential*, 207 F.3d 674, at 676), can only serve to *frustrate* the interests of justice.

On the other hand, if a state law claim of age discrimination like the one presented here, which does not seek recovery of pension benefits, and has no potential impact whatsoever upon either the assets or administration of any ERISA plan, is permitted to be fully-litigated in the state court where it is filed, despite the allegation of a "pension-defeating" motive, as long as the defense of "ordinary

preemption" remains available to the defendant, the goals and objectives of ERISA will be preserved. As an added benefit, however, the goals and objectives of state anti-discrimination laws will also be preserved, along with the interests of justice not just for employers, but *for all parties concerned.*

CONCLUSION

On the basis of the foregoing, and the arguments set forth in his pending Petition, Petitioner respectfully submits that the application of "complete preemption" to Petitioner's state law age discrimination claim in this case, in light of the conflict among the circuit courts of appeal on the question presented for review, and the confusion and uncertainty regarding this issue among our federal courts in general, provides a compelling basis for this Court to grant the pending Petition, so that it can revisit the important issues raised.

Respectfully submitted,
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